SUPREME COURT, U. S.
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APPENDIX

Volume III, Pages 1110–1606

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1560

UNITED STATES OF AMERICA, PETITIONER
v.
UNITED STATES GYPSUM COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MAY 9, 1977
CERTIORARI GRANTED OCTOBER 3, 1977

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Bring in the jury.

While they are bringing in the jury, I will just—in relation to your request for charge, I will charge, in substance, as you have requested, omitting the statement this policy was established in advice of the legal department.

You can argue that, if you want, but I am not willing to charge that. But, other than that, I will, in my closing charge, charge in substance as you have requested.

Mr. McSweeney. Yes, Your Honor. Thank you

Mr. Fricano. May we submit a charge, in any event, Your Honor?

[10,719]

The Court. Yes, of course, points for charge.

Mr. Fricano. Yes, on this point, Your Honor.

The Court. Yes. You have seen Celotex's point for charge.

Mr. Fricano. I just saw it, immediately before, this morning.

The Court. I said I am going to charge that way, in substance. Since I don't write it out—I write out charges, but I don't read them. I deliver them—sort of ad lib it, a little bit. I want to make clear that I will not necessarily use that specific language, but with that thought in mind, and I think that's what I said earlier, that I intended to charge.

• • • • •

[10,758]

E. BRADFORD HOLLINGSWORTH

DIRECT EXAMINATION

• • • • •

Q. Now, after Georgia-Pacific acquired Bestwall Gypsum Company, were you involved in any discussions as to what Georgia-Pacific's policy was with reference to the level [10,759] at which these plants should be operated?

A Yes, I was.

Q. And when did that discussion take place?

A. Well, that took place, I guess it was in May, late May or early June of 1965, and, at that time, the top management of Georgia-Pacific Corporation scheduled a full-blown meeting with the key people of Bestwall—of the former Bestwall Gypsum Company, and the purpose of the meeting was to get acquainted on both sides. They wanted to hear what we were doing in gypsum, and they wanted us to know how they felt, amongst their side, and this was sort of a general discussion of sales, merchandising, production, operations, this sort of a general rundown of the whole operation.

Q. Now, this meeting was held less than two months after the acquisition of Bestwall by Georgia-Pacific; is that correct?

A. Yes, that is correct.

[10,760] By Mr. Mellott:

Q. Who attended that meeting from Georgia-Pacific?

A. Well, from the Georgia-Pacific side there was Mr. Pamplin, who was Chairman of the Board. And, Mr. Hunt, who was the Vice-President and Executive Vice-President in charge of Building Materials and, incidentally, the fellow who was connected with the gypsum end of it directly from Georgia-Pacific.

And there was Bob Wilson, who was the Controller for Georgia-Pacific.

And Harry Kane, who was their Chief Financial Officer and Executive Vice-President.

Q. And who attended the meeting from the former Bestwall Gypsum group?

A. Well, Mr. Fredericks was there, who was President of the Gypsum Division at that time.

And, Mr. Glenn Wilson was there, who was the Chief Operations man.

Alec McGaskill was there as head of Sales for the Gypsum Division .

And the production managers were there, and the heads of sales operations. It was a good-sized meeting.

Q. Mr. Hollingsworth, would you tell the jury, please, what the representatives of Georgia-Pacific told you at this meeting held less than two months after the acquisition [10,761] of Bestwall by Georgia-Pacific with reference to the level at which Georgia-Pacific desired to have the gypsum plants operated?

A. Well, there was considerable discussion. They, of course, were interested in how we had been running them.

And before the meeting was concluded, they advised us that it was their policy, Georgia-Pacific's policy, to operate their assets at capacity. That we would be expected to do it, to do it that way, and that our sales department and theirs together would be expected to sell it. And, that we were to operate our plants to the utmost of their capacity.

And, if we needed warehouse space, whatever we needed to accomplish this approach, this policy, we were supposed to get ourselves organized and they would approve the expenditure, if necessary, of funds to carry out this program.

Q. Who was the chief spokesman from Georgia-Pacific in enunciating this policy of flat-out production?

A. Mr. Pamplin, Chairman of the Board.

Q. Now, when you left that meeting, did you have any doubts that Georgia-Pacific employees responsible for gypsum production had received a clear cut and emphatic instruction to implement a flat-out production policy of Georgia-Pacific as far as gypsum production was concerned?

[10,762] A. No. I think everyone that attended the meeting got the message very clearly.

As a matter of fact, we were concerned in Operations it meant—it is a change, I think, and any time you get into a change of operating policy, something you have been comfortable with for years, you kind of wonder whether you should change or not.

So that there was some, there was some concern, and certainly complete understanding.

We came away with a message very clear that this was to be done, and regardless of any feelings we might have had, we proceeded to carry it out.

Mr. MELLOTT. If the Court please, I would like to read just an introductory sentence from Georgia-Pacific Exhibit 4, which is in evidence. It is dated June 11, 1965. It is from Mr. R. B. Pamplin to the File entitled "Bestwall Gypsum." The first sentence is all I will read at this time, unless Government counsel would like me to read some of the balance of it.

> We met with the key people of the Bestwall organization at Paoli, and we all agre that we must sell 100 percent of production.

By Mr. MELLOTT:

Q. From time to time following this meeting in the summer of 1965, were these instructions as to flat-out [10,763] production reiterated by various officials of Georgia-Pacific?

A. Yes, they were. It was a matter of more or less continual discussion of this approach. We had a few things that we had to accomplish in order to accommodate it. And, of course, the

whole thing was quite new to us, and we did quite a bit of discussion with other branches of the company as well as among ourselves.

Q. Well, has this policy been stated to you from time to time since May, 1965 through 1973?

A. Yes, indeed.

Mr. MELLOTT. If the Court please, I would like to read from Georgia-Pacific Exhibit 167, which is in evidence.

It is a letter dated December 3, 1971, from Mr. W. H. Hunt to J. W. Hart, E. B. Hollingsworth, and T. W. Richards.

By Mr. MELLOTT:

Q. Before I start to read it, would you tell us, please, who Mr. J. W. Hart is?

A. Mr. Hart is the Operations Manager for our Paper Division. We have three paper plants, two in the United States, and one in Canada. We also have a paper converting plant in Canada; and, Mr. Hart is the gentleman who is responsible for the operations and production from those [10,764] plants.

Q. And was that his position in December 1971?

A. Yes, it was.

Q. All right, sir.

Who is Mr. T. W. Richards? What was his position in December 1971?

A. Mr. Richards is my counterpart in the Western part of the United States. He has the five gypsum plant operations West of the Mississippi.

Q. And did he have that position in December, 1971?

A. Yes, he did.

Mr. MELLOTT: All right.

This, as I indicated, is a note from Mr. Hunt to those three individuals entitled "Subject: Full-Capacity Production."

> Concerning the discussions at our standards meeting, this will confirm that each and every one of our plants will run full unless circumstances are such that my approval is granted to do otherwise. If you should be unable to reach me by telephone and any situation of this nature develops requiring suggested action along these lines, then Harold Sand will be the man to contact with authority to make the decisions after the facts are in his possession.

[10,765] By Mr. MELLOTT:

Q. Who was Harold Sand?

A. Harold Sand was the head of the Distribution Division. And they, of course, took our production and merchandised it. They were our merchandising organization.

Mr. MELLOTT: Continuing with the letter:

> There should be a continuous communication with Sales as far in advance as possible. If a problem seems to be developing, Gene Burch should know about it either through Harold Sand or Stan Dennison. The only way we are going to make the right kind of money is to run these plants; and with the proper communication between Sales and Production I am sure we can do it at least the majority of the time. It will be necessary to use our warehouse space to the best possible advantage, and in some cases, we may need more.
>
> If you should have any recommendations along these lines, we will be glad to consider them. Naturally the ideal thing to do is to keep putting the production out as fast as we produce it. Should there be a temporary surge of production and a lack of sales, however, then our warehouses should absorb it and vice versa when things go in the other [10,766] direction.
>
> Let's do our utmost to bring this about. I am sure we can improve what we have been doing if everybody works together.

By Mr. MELLOTT:

Q. Now, Mr. Hollingsworth, is the document which I have read typical of the type of pressure that you continued to receive from top management of Georgia-Pacific from May 1965 through 1973 to keep the plants running at flat-out production?

A. Yes, that is true.

Q. Now, were there steps taken at the gypsum operation to implement the flat-out production policy?

A. Yes, there were. We had to have more warehouse space. The inventory, our inventory capability was too low to accommodate this program, so we instituted an analysis of all our plants and submitted a request for additional warehouse space.

We also had the problem of finding some people to help us operate seven days a week. We couldn't expect our people to

work seven days a week steady for 52 weeks a year, so we had to get some spell off people in the plant so that we could run the plant seven days and still not require our employees to work steady for seven days.

And, of course, I am sure our Sales Department [10,767] had a lot of adjustments to make in their approach, too, so we had things to do.

[10,768] By Mr. MELLOTT:

Q. Would you keep you voice up, Mr. Hollingsworth?

A. Yes.

Q. Well, were additional warehouses built at Georgia-Pacific plants following the acquisition?

A. Yes, they were.

Q. Now, I would like to discuss next with you the timing of the implementation of this flat-out production policy.

First of all, how long did it take to complete this first program of construction of warehouses at the plants?

A. Well, the initial phase of it was done by, I would say, the winter of 1967. We had by that time—we had spent over a million dollars in building warehouse space, and we had eased up our inventory situation considerably, and this went on until, I guess it was finally completed by the fall of 1970.

I would say by that time we had everything done, and we had spent about a million and three-quarters dollars by that time, and we had considerably helped ourselves as far as our ability to store products was concerned.

Q. Was a substantial portion of the additional warehouse capacity completed prior to 1970?

A. Yes.

[10,769] Q. By what time?

A. Two-thirds of it was done by '67.

Q. All right. Would you tell us, please, at which of the plants Georgia-Pacific constructed additional warehouse space?

A. At every plant, with the exception of Sigurd, Utah. I think I mentioned before we had just put up a warehouse there. We didn't have any, and we had just put one up, which seemed to be adequate.

Q. When you say "we," you mean Bestwall had just put one up at Sigurd, Utah, prior to the acquisition, is that what you mean?

A. Yes, that's true.

Q. Now, with reference to the warehouse space that was added at all of the plants other than Sigurd by Georgia-Pacific following the acquisition, approximately what volume stated in terms of square footage of wallboard, was added at each plant?

A. well, as far as footage is concerned, I would say we added about, by the end of the program, we were able to store 45 more million feet than we were able to at the start of the program.

Q. Now, approximately at what point in time did this flat-out production policy of Georgia-Pacific actually begin to make a difference in the level at which the gypsum [10,770] plants were being operated by Georgia-Pacific as compared to the level at which they had been operated by Bestwall?

A. Well, there was an immediate effect, of course, because the push was there, and the desire was there, and the pressure was on us to get the product out and onto sales to sell it.

So that there was an immediate difference. I think it probably made itself felt by November, December, January, February of that first year that we were part of Georgia-Pacific, but we didn't have the capabilities at that time to fully adjust to this, so that I would say it was probably in 1968 we were rolling along in pretty good shape as far as this policy was concerned.

Q. By the beginning of 1968 or the end of 1968?

A. I would say substantially by the beginning of '68.

Q. Now, we went through a typical year of production at Bestwall. I would like to do the same thing after the institution of the flat-out production policy at Georgia-Pacific.

What was the number of days a week that the plants, the gypsum plants of Georgia-Pacific, were typically operated in each month of the year following the implementation of this flat-out production policy?

A. Well, every effort was made to run six or to [10,771] average six and two-thirds days a week.

We did have some interferences from holidays, as I mentioned before, and we had some operating problems, maintenance problems, or special plant situations that might interfere with it, but we were expected to go six and two-thirds days a week.

This was the finding evolved as interpretation of flat-out. I think some of these documents you have been reading, they're talking about 100 per cent capacity.

It took some time to develop an understanding of what was meant by that, and finally we evolved that if we operated our plant six and two-thirds days a week, we were conforming to desires of top management.

Q. How many shifts would be involved in the six and two-thirds days a week operation?

A. That would be 20 eight-hour shifts. That would be three a day for six and two-thirds days.

Q. So at Georgia-Pacific, after the implementation of the flat-out produciton policy, in each month of the year, you would average approximately six and two-thirds days of work per week, is that correct?

A. Not quite. We used to—we used to save some of those one-thirds days for Christmastime and New Year's time, and perhaps do a little bit of deferred maintenance work at that time, and then, we would roll along without [10,772] losing that one-third of a day later on in the year, so that there was a tendency to get things done that had to be done at the plant during the Christmas and New Year's holidays.

Q. Well, then is it correct, then, that what you are saying is it would average out to six and two-thirds days a week over the entire year?

A. Yes, that is true. This was our objective.

The COURT. Is this a good point, now, to stop for the morning recess?

Mr. MELLOT. Yes, this is fine, Your Honor.

[Whereupon, a brief recess was taken.]

[10,773] The COURT. Proceed, sir.

Mr. MELLOTT. Thank you, Your Honor.

By Mr. MELLOTT:

Q. Mr. Hollingsworth, in a typical year of operation, how many extra days of production would there be for Georgia-Pacific with reference to the gypsum plants as compared to Bestwall Gypsum Company?

A. Well, I would say on the average you could figure about 30 days more operation per year from each of the plants. That would be an average. It would, of course, vary according to the condition that existed at any one of the plants.

Some of the problems I spoke of before.

Q. So the flat-out production policy of Georgia-Pacific increased on the average the days of production of the gypsum plant by about 30?

A. About 30 days, yes.

Q. Let's see if we can understand the significance of this flat-out production in terms of volume.

We have been discussing up to this point in terms of days of production.

In an average day of production by the Georgia-Pacific plants that were in existence in 1968, approximately how many square feet of gypsum board is produced on the average? And for this purpose, let's use one-half inch [10,774] wallboard as the standard, since that has been referred to variously throughout the case as the plain vanilla and the bread and butter board.

A. Well, at that time our capacity for one-half inch board was over 5 million a day, somewhere in the neighborhood of 5 and a quarter or 5.3 million feet per day.

Q. That would be 5.3 million square feet of one-half inch wallboard produced per day. That is the total at all the plants in 1968, is that correct?

A. Yes, that is true.

Q. If as a result of Georgia-Pacific's flat-out production policy the average production of the plants was increased one day a week, that would be how much production of one-half inch wallboard that would be increased?

A. 5.3 million.

Q. This is in 1968?

A. In 1968, yes.

Q. On a five day week basis, how much would that be for five days, how much would that be?

A. You mean comparing the flat-out to five days?

Q. Yes.

A. Well, you would have 5.3 plus another 34—you would probably have 8–9 million. About 9 million.

Q. What would be the equivalent figure on a monthly basis, if the result of the flat-out production policy was [10,775] to increase the weekly operations by a day and two thirds for the Georgia-Pacific plants in existence in 1968?

A. Well, you could take that 8 million and multiply it by four and a third. You get pretty close to 40 million feet.

Q. That would be 40 million square feet more of one-half inch, wallboard produced per month by operation of the flat-out, increasing the production one and two third days per week, is that correct?

A. That is true.

Q. These figures are without counting the addition of the Buchanan plant production, which did not come on-stream until after 1968, is that correct?

A. Yes, that is true.

Q. Do these figures include increases in the Georgia-Pacific capacity that occurred after 1968?

A. After 1965, yes.

Are we talking about 1968?

Q. We are talking 1968 at this point.

The figure of 39 million square feet of one-half inch wallboard, the extra per month, that takes into account the increases in capacity in Georgia-Pacific plants from May of 1965 through 1968, is that correct?

A. Yes, it does.

Q. But does it take into account the increases in capacity in [10,776]

those plants after 1968?

A. No, it does not.

Q. Now, did Georgia-Pacific, after the acquisition, increase its manufacturing capability for making gypsum board in any ways other than utilization of this flat-out production policy we have been referring to up to this point?

A. Yes. There were many ways in which this was accomplished. There was the, I would say, normal efforts in operation to improve the output of equipment. This was a constant objection of the operating division, to get out more board with the same investment and equipment. You might call it improvement in the art of manufacturing the board itself.

This had its effect as far as increasing production is concerned, and we could ordinarily figure on an average of maybe 3 percent per year increase in productivity.

In addition to that we—after Georgia-Pacific came along, we built a plant in Buchanan, New York, in order to serve the New England market, where we were very poorly represented, our closest plant being Akron, New York, or Wilmington, Delaware, and the freight costs being considered. So a plant

was built in Buchanan, New York, which is about 20 miles above New York City, in order to get us into that New England market.

[10,777] Then there were—we also purchased a half built or more than half built plant in Lovell, Wyoming, and started that up in 1967 to serve the Northwest and the states of Washington, Oregon, Montana.

And then, of course, there were some specific things that were done at the plant to increase production, such as adding boilers and putting bigger burners on the dryers and stretching out the drying zones so that we had more time to dry the wallboard and buying bigger equipment, and just generally investing in things that would push production up.

[10,778] By Mr. MELLOTT:

Q. You stated, I believe, that the Lovell, Wyoming, plant came on stream in 1967. What part of 1967 did it come on stream?

A. That was late, late '67.

Q. You also referred to the construction of a new plant in Buchanan, New York. When did that plant come on stream?

A. That came on stream in 1969, again late in the year.

Q. Approximately what was the annual capacity of the Lovell, Wyoming, plant, which came on stream the latter part of 1967, and the Buchanan, New York, plant, which came on stream the latter part of 1969? And here, again, let's use one-half-inch wallboard as the standard for determining capacity.

A. Very well. At Lovell, Wyoming, we had a—we had an installation, there, that had an inherent capacity of about 175 million feet per year, but we were unable to take advantage of it, because the builders of the plant had not built enough support equipment to process the gypsum rock, and we couldn't process enough gypsum rock to make all the wallboard that we could make, so we were forced to do what we could with what we had, so our capacity, at the time the Lovell plant was started, was about 90 million feet [10,779] a year. The capacity at the Buchanan, New York, plant, I think it was designed for about 170, 175 million feet per year.

Q. Now, you have indicated that you had some problems at the Lovell plant, not being able to reach its rated capacity. Was that situation ultimately corrected by Georgia-Pacific?

A. Yes, it was.

Q. When?

A. Well, that was corrected in 19—I believe that was in 1972, that it was effective, fully effective.

Q. So that, by 1972, the capacity of the Lovell, Wyoming, plant was then approximately 170 to 175 million square feet; is that correct?

A. Yes, it was.

Q. Now, I believe you said that the capacity of the Buchanan, New York, plant was also at about that same level?

A. Yes, it was. They were somewhat similar in design.

Q. Well, now, were either—strike that.

Was the capacity of either of these plants—the Lovell, Wyoming, plant or the Buchanan, New York plant—increased, subsequently, by Georgia-Pacific, above this level of 1970 to 175 million square feet per year?

[10,780] A. Yes, it was. I spoke of this method of pushing things along by improvements in the art of manufacturing wallboard, and also there were some minor expenditures made at those locations to assist in increasing the output.

Q. And to what capacity were those two plants later raised, on an annual basis, also in terms of one-half-inch wallboard?

A. By what date?

Q. Well, by 1973, which is the last year we are interested in here.

A. Well, by 1973, those plants were capable of about 180, 185 million.

Q. Now, in your earlier testimony, you gave us a comparison of the number of days of operation of Georgia-Pacific of the plants, as compared to the number of days of operation of Bestwall, and days of output—a comparison.

When you made those comparisons of days, were you comparing days of output for Bestwall of fewer plants with lower capacity, to more days of operation at Georgia-Pacific of more plants with higher capacity?

Yes, I was. That was the comparison.

Q. So, in some periods, like January and February, when Bestwall was operating its plants at five days a week as compared to Georgia-Pacific, later, operating at six and two-thirds days a week, with additional plants and additional [10,781] capacity; isn't that correct?

A. Yes, it is.

Q. Now, with reference to this new plant that was constructed at Buchanan, New York, did Bestwall ever consider constructing a plant to serve the northeastern markets of the United States?

A. Yes, they did. There was an investigation made in the late '50's, or early '60's—early '60's, I would say.

Q. And what determination was made, at that time, by Bestwall?

A. Well, a proposal was drawn up—the location that was selected for analysis was near Boston, Massachusetts, and a potential site was located, and the analysis was drawn up, indicating what management could expect in the way of return on their investment from a plant in that location, and, at the time, Bestwall Gypsum Company decided to shelve it. It was put away. They decided not to do it at that time.

Q. I believe you previously testified that the Buchanan plant was built by Georgia-Pacific to serve the northeastern market of the United States; is that right?

A. Yes, it was.

Q. Did Georgia-Pacific, in anticipation of the Buchanan plant's coming on stream, take any steps about acquiring warehousing space in the northeastern United [10,728] States?

A. Yes. We leased a warehouse, on a temporary basis, in Hartford, Connecticut, and the purpose for that was to introduce Georgia-Pacific's gypsum products to the northeast. We were not well represented there, and our sales department felt that, if we could introduce our products prior to the actual output from the Buchanan plant, that it would be of considerable assistance in their sales efforts, and they would be ready to go when we were ready to go.

Q. Do you know approximately what the capacity of that warehouse space was that you just referred to?

A. About three and a half million.

Q. Square feet?

A. Square feet, um-hum.

Q. Now, Mr. Hollingsworth, you referred to the various gypsum plants that have been under your jurisdiction, and that are under your jurisdiction, in the periods I have referred to in my questions. Do those gypsum plants product different sizes of board?

A. Different sizes, different thicknesses, different lengths; yes—different widths.

Q. And would you tell the jury, does a gypsum product line produce the same amount of board, measured in square feet, regardless of the thickness of the wallboard it is producing? [10,783] A. No, it does not.

Q. Would you explain that to us, please?

A. Well, the thicker products we make—we manufacture a wallboard that is five-eighths of an inch thick, and that particular product is a lot heavier, of course, than a wallboard that is only half an inch thick, and, inside—between the papers which enclose this wallboard in the core, what we call the core, and it contains water, to begin with, in order to make it fluid so we can form it between the sheets of paper, and this excess water had to be driven off in the dryer, and, since there is more water in the thicker products it takes longer to dry it, and, therefore, our daily production is less on the thicker products, and, conversely, it is more on the thinner products. The three-eighths-inch wallboard, we can manufacture faster than we can the half-inch wallboard.

Q. So that, if you are operating a plant 20 shifts a day, and you assume you are operating it without delay, for one-half-inch wallboard, then, you operate the same line, the same number of shifts, without delay, for five-eighths-inch wallboard—is it correct, you would produce less five-eighths than you would one-half-inch wallboard?

A. Yes, you would produce less on a five-eighths.

Q. Would that difference be a substantial difference or an insignificant one?

[10,784] A. Yes, it would.

Q. Well, would it be substantial or insignificant?

A. Substantial.

Q. If one is talking about the ability of a plant to produce quantities of wallboard, is it necessary to consider that capacity in terms of the types and thicknesses of the wallboard being produced at the plant?

A. Yes, it is.

Q. So that, in all of my questions and your responses to me, with reference to capacity of plants and amount produced per day, we have been using a standard, one-half-inch standard wallboard; is that correct?

A. Yes, we have.

Q. If we had used five-eighths as the standard for production, the capacity would have been indicated in a lesser figure; isn't that correct?

A. Yes, it would.

Q. Now, Mr. Hollingsworth, during the time that you were with the Bestwall Gypsum Company and responsible for operating plants, to whom did you ship the gypsum board products that were produced at those plants?

A. We shipped mainly to lumber dealers and building materials supply people.

Q. And you shipped to them for resale; is that correct?

A. Yes. They sold it to the applicators, contractors.

[10,785] Q. Now, after the acquisition by Georgia-Pacific of Bestwall, was there any change in the identity of the parties to whom the production of the plants under your jurisdiction was shipped?

A. Yes, there was. There was, gradually, more of our production that went either directly to the branches themselves, at their individual locations, or to customers who were secured or, let's say, the order was secured by the distribution division for direct shipment to their customers.

Q. Now, would you tell me, please, for each of the gypsum plants under your jurisdiction, at approximately what point in time approximately 75 to 80 percent of the gypsum products made by that plant was shipped either to the branches of Georgia-Pacific for stock in their warehouses and resale by them from that stock, or direct to customers where the branch obtained the order?

A. I would say that was essentially accomplished by 1968.

Q. By the beginning of 1968?

A. I would say so; yes.

Q. Now, during the period 1965 to 1968—period covered by my prior question, as well—was Georgia-Pacific making sales to Johns-Manville?

A. Yes.

[10,786] Q. You were shipping from the plant to Johns-Manville; is that correct?

A. Yes, we were.

[10,787] By Mr. MELLOTT:

Q. Were those sales through the branches?

A. No, they were not.

Q. So, with respect to the figures that you have just given, 75 to 80 percent. . .

Mr. THORSON. Objection, Your Honor. I don't believe these figures were given by the witness. They were given by counsel.

Mr. MELLOTT. All right, I will restate the question, Your Honor.

Mr. THORSON. They were just figures incorporated in a question.

Mr. MELLOTT. They were figures incorporated in a question, and he gave me a date as to when those figures had been reached at the plant.

The COURT. All right. Rephrase it so that they are his figures.

Mr. MELLOTT. I will rephrase it.

By Mr. MELLOTT:

Q. Now, in response to my question as to when 75 to 80 per cent of the products shipped by the plants under your jurisdiction were shipped either to the branches or direct to customers on orders received by the branches, you state that that had occurred by the beginning of 1968.

Now, you did not include in coming to that, or [10,788] answering that question, shipments to Johns-Manville; did you?

A. No, I did not.

Q. So that if we removed those sales from the total sales of Georgia-Pacific, the percentages of 75 to 80 per cent by the beginning of 1968 would be even higher; would they not?

A. Yes. Considerably.

Q. Now, in connection with selling and moving products to and through the branches of Georgia-Pacific, did you have occasion from time to time to talk and meet with regional managers of the Georgia-Pacific Distribution Division and branch managers of that same Distribution Division?

A. Yes, I did.

Q. And did they know about the flat-out production policy of Georgia-Pacific?

A. Yes. It was an old story to them.

Q. Did you ever discuss with them that it was their responsibility and function to move the flat-out production from the plant under your supervision either to customers or to their warehouses?

A. Yes, I did.

Q. Did you from time to time, after the acquisition of Bestwall by Georgia-Pacific, put pressure on the [10,789] Distribution Division and their personnel to move that flat-out production out of your warehouses at the plant?

A. Yes, I did.

Q. On many occasions or few occasions?

A. Many occasions.

Q. During this period 1965 through 1973, May 1965 through 1973, did you have a regular procedure by which you and the plants coordinated with the Distribution Division in order that the Distribution Division of Georgia-Pacific could handle the flat-out production from your plants?

A. Yes. We found it necessary to develop a routine approach to this thing in order to make sure that everyone knew what the situation was, and that we could see trouble before it actually arrived, and perhaps avoid it by anticipating it.

Q. Well, now, you say it was routine. On what periodic basis did you have contact?

A. Well, the plants, of course, were the key to this situation. They were the place where the inventories were built and shipments were made. And so we asked them for a weekly report. In that weekly report they would advise us, everyone, including Mr. Pamplin, the number of days that they had operated that week that they were reporting for. And, also the number of days they anticipated operating in the following week.

[10,790] And if there was any weaknesses in this report as far as following our policy was concerned, we of course immediately went to work on it in an effort to get back in line with what our objectives were.

In addition to that, the plants would call the branch managers and the regional managers that were taking product from their plant, and they would advise them if things didn't look good, their inventories were starting to crowd them, and they were going to have to shut down unless some action was taken to move some of the material that they were accumulating.

And this was—this was to be done whenever the clouds appeared rather than after it had happened, because it we waited too late, of course it was too late for the Sales Department to move and get things going and keep us going. So we tried to anticipate the problems and reported them accordingly.

We even went to—in some cases we had allocations to these branches, each branch that took product from this plant "X" we will call it, had a quota. And they were supposed to feed that much business into the plant on a daily basis. And when they failed to do that, when they failed to get that material in to us, then we reported back to the boss of the branch and back to his regional manager.

[10,791] In addition to that I was personally in contact with the gypsum specialist in each of the areas that were taking product from my plants. I was also in contact with the gypsum sales people who were distinct from the Distribution Division. Mr. Burch was the head of that. I would be in touch with him if problems were coming along. So, there was a constant flow of information in connection with this program.

Q. Between the plant and the branches or the sales arm of the company; is that correct?

A. Yes. Back and forth.

Q. Now, was it part of your responsibility to see that the plants under your jurisdiction were operated with this goal of flat-out production in mind?

A. Yes, it was.

Q. And were you held accountable by the top management of Georgia-Pacific to do that?

A. Yes, I was.

Q. Were you required to make any reports to them on a periodic basis concerning your compliance with that policy?

A. Well, this report of course was covered by the one that was received from the plant. Each plant submitted a weekly report showing what, how they operated that week, and how they intended to operate the next. That [10,792] report went to everyone who was concerned with this policy, including the Chairman of the Board, Mr. Pamplin.

And that, of course, was the basic information in connection with the program.

Q. Well, were the plant managers under your jurisdiction permitted to deviate from this flat-out production policy without talking to you about it and getting your approval?

A. No, they were not.

Q. And were you, as part of your function, free to deviate without consulting your superiors?

A. No, I was not.

Now, this has nothing to do with special situations or, you know, if you have a breakdown or something of that nature, which is unavoidable. There is no point in trying to get approval, because it has already been done. So, what you did was try to patch it together and get back on the rails as fast as you could.

Q. Well, we are not trying to indicate that the plants always operated at flat-out; are we?

Mr. THORSON. Objection, Your Honor, to the form of the question.

Mr. MELLOTT. All right, I will rephrase it.

By Mr. MELLOTT:

[10,793] Q. Mr. Hollingsworth, isn't it usual in the operation of a plant, that there are times when breakdowns occur, when there are work stoppages, and when maintenance is required on the machinery at the plant?

Mr. THORSON. Objection, as being already asked and answered by the witness.

The COURT. Go ahead and answer it.

The WITNESS. Would you repeat the question, please.

Mr. MELLOTT. Well, I think it has been answered, Your Honor, I will withdraw it.

By Mr. MELLOTT:

Q. Now, did there come a time, Mr. Hollingsworth, when you actually moved to Portland to be located at the office of Georgia-Pacific there?

A. Yes.

Q. When did that occur?

A. This was in 1967 that I moved from the former Bestwall offices to the home offices of Georgia-Pacific in Portland, Oregon.

Q. How long were you located in Portland?

A. Until 1972.

Q. Now, after the initial series of instructions designed to convey to you the policy of Georgia-Pacific to produce on a flat-out basis, did Georgia-Pacific's [10,794] top management continue to take an interest, and was there a geniuine effort by that management to see that you adhered to the flat-out production policy of Georgia-Pacific?

A. Yes. Yes, there was. The management, of course, paid quite a bit of attention to those weekly reports that came in from the plants and, as a result, so did everybody else. We were all anxious to have them read right.

In addition to that we had a monthly meeting with top management of Georgia-Pacific, and at those meetings the performance of the Gypsum Division would be reviewed in some detail, and at that time there would be considerable discussion if there had been any weakness as far as operating these plants flat-out was concerned.

In other words, if there was some indication of failure to comply with this program, there would be considerable discussion as to why and how to take care of it.

Q. Well, you referred to monthly meetings with top management of Georgia-Pacific. What top management attended these monthly meetings?

A. Well, Mr. Pamplin, Chairman of the Board, attended.

Mr. Hunt, who was both Executive Vice President at one-time, and then later President, attended the meetings.

Harold Sand attended the meeting. He was the head of the Distribution Division.

[10,795] And then the members of the Gypsum Division, Mr. Wilson, who was Vice President in charge of the Gypsum Division.

Myself. My counterpart, Mr. Richards, who was mentioned before. Mr. Hart, who was in charge of the paper. Our accountant, Mr. Foster, and Mr. Burch, who was head of our Sales Arm.

We would get together once a month and look things over. And, as I say, if there was any problem as far as operating flat-out was concerned, it was thoroughly discussed.

[10,796] By Mr. MELLOTT:

Q. And did these meetings take place on a regular basis during the entire five years that you were located in Portland?

A. No, they did not.

Q. During what portion of that period did they take place?

A. Oh, I would say about two years, two years of that time.

Q. And was it which two years?

A. Just about in the middle. I would say they were instigated about a year after I got there and——

Q. That would be in '68?

A. Yes.

Q. And, then, continued in '68 and '69?

A. '69, and possibly '70. I don't have an accurate recollection, but it was about a two-year period, and, then, we would have one every once in a while after that, but they were very regular during the period that I am discussing.

Q. And the question of your compliance with the flat-out production policy came up at most of these meetings?

A. Yes.

Q. Is it correct to say, then, that from May, 1965 [10,797] through 1973, the top management of Georgia-Pacific consistently established and insisted upon a policy and practice of as much production of gypsum wallboard as possible from its plants on the flat-out basis; they increased the capacity of the plants and added two additional plants; and charged you in production to operate in accordance with that policy and the distribution division to operate in accordance with that policy?

A. That is true.

Q. And you personally performed your functions at Georgia-Pacific in compliance with that policy, is that correct?

A. I did the best I could, yes, sir.

Q. Now we will change to a slightly different aspect of this policy.

Was one of the purposes of the flat-out production policy an effort to decrease the unit cost of production of gypsum wallboard?

A. Yes, it was.

Q. Would you explain to us how it produces that effect?

A. Well, there are many items of costs in manufacturing a product which do not increase as your increase the output.

I'm thinking now of things like taxes, property [10,798] taxes that you pay at your plant level, the depreciation that you charge against costs for the value of the plant.

Ordinarily your salary structure is a pretty stable situation, regardless of output.

There are certain items of costs such as power, the demand cost for power, which is a constant figure every month rather than varying with the quantity of electricity that you use, and ordinarily our power schedules are such that the more power you use, the less it costs you, as far as the direct costs is concerned, so there are definite and significant economies to be gained by manufacturing everything that you can possibly

manufacture in a given location, as far as the unit cost of output is concerned.

Q. Now, during the period 1965, May, 1965, through 1973, have you, as part of your regular job responsibility, kept track of and abreast of production costs of gypsum wallboard throughout the country?

A. Yes, I have.

Q. What are some of the chief cost factors in the production of gypsum wallboard?

And, now, I would suggest you refer only to those other than the fixed costs which you have referred to in one of your previous answers.

A. Well, paper is one of the major costs. Cost of rock, the gypsum rock that we use and process is another [10,799] major factor.

Energy costs, of course.

Q. Other than the demand cost—well, the demand cost is a fixed cost which you referred to previously?

A. Right.

Q. But you are talking about cost for energy, both from a demand standpoint and the usage standpoint, is that right?

A. Yes, the total bill. It is significant as far as being a portion of the total cost is concerned.

Fuel, we use a lot of fuel, and, of course, our labor costs are another significant part of it, and the costs of maintenance is also very significant, the costs of keeping your equipment in good shape and keeping it operating at a good, efficient clip.

Q. Were the costs of producing gypsum wallboard generally increasing or decreasing during the period 1965 through 1973?

A. They were increasing, mainly because of the very heavy inflation that we have experienced in that period.

Q. Now, do some of these costs of manufacturing gypsum wallboard vary in terms of the particular location of the plant involved?

A. Yes, very definitely.

[10,800] Q. Are unit production costs of wallboard the same throughout the country?

A. No, they are not.

Q. Do they vary substantially or insignificantly from location to location?

A. Substantially.

Q. Have you, as part of your operating responsibility, at any time had jurisdiction for the operation of a gypsum wall board plant in Texas?

A. Yes, I have.

Q. And you have already testified as to the extent of your experience in the operation of plants in other parts of the country, is that correct?

A. Yes, that is correct.

Q. Now, what is your experience as to how the cost of producing gypsum wallboard in Texas compares to the cost of producing gypsum wallboard in other parts of the country?

A. Well, Texas is the lowest cost area in the United States. It is not only true of us, I believe it is true of most manufacturers who are located in Texas.

The rock deposits are particularly favorable. You don't have to mine it. You just remove the over-burden, which is a soft clay, and, then, there is about five feet of a hard material, not quite like a rock, on top of the deposit. We scrape that off, and there is twenty-two feet [10,801] of nice gypsum rock, and it isn't too expensive to get it out under those conditions, so you have that advantage.

And you have the advantage of a local source of—I say "local," fairly close source of paper up in Pryor, Oklahoma, which isn't too far from the Panhandle of Texas, where we are located, and so you have an advantage there on the freight as far as paper is concerned.

On top of that, our paper plant in Pryor, Oklahoma, is a very low-cost paper plant, and between the two, we find Acme in a very favorable position as far as paper is concerned.

And, of course, I did mention the rock. Fuel costs, there are natural gas from local sources, and historically have been very inexpensive, and power, likewise, has been inexpensive in that area, I would assume primarly because it is generated with low-cost gas.

So we are in a favorable position from fuel, power, and paper and rock. It is just a good, favorable spot to manufacture wallboard.

Q. You referred to the Acme plant. Is the plant you are referring to the Acme, Texas plant of Georgia-Pacific?

A. Yes, it is.

Q. And you also referred to the paper plant in Pryor, Oklahoma. Is that also a plant of Georgia-Pacific?

A. Yes, it is.

[10,802] Q. Now, to tie these differences in cost, unit cost of producing gypsum in Texas, as to other parts of the country, lets see if we can put that in terms of dollars.

Generally, how does the production cost of gypsum at the Acme, Texas plant compare to the Georgia-Pacific cost of production at the Buchanan plant, for one-half inch wallboard?

A. Now, this is back in 1968?

Q. Well, it would be after your Buchanan plant went on stream in November, '69, so——

A. O.K.

Q. Let's take any time during the period from then and through '73.

A. I would say there would be a difference of about $12 a thousand.

Q. $12 per thousand square feet?

A. Higher at Buchanan than it would be at Acme, Texas.

Q. To produce one thousand square feet of one-half inch wallboard, is that correct?

A. That is correct.

Q. How about the comparison of Acme, Texas to the Wilmington plant of Georgia-Pacific?

A. I would say there that Acme would be about $10 a thousand lower than the Wilmington plant.

[10,803] Q. To produce one thousand square feet of one-half inch wallboard, is that correct?

A. Yes.

Q. Have you visited the Acme, Texas plant at any time?

A. Yes, I have.

Q. And on very many occasions?

A. I would say so, yes.

Mr. MELLOTT. May I approach the witness, Your Honor?

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[10,808] STANLEY S. DENNISON

DIRECT EXAMINATION

By Mr. MELLOTT:

Q. Would you state your name, please?

A. Stanley S. Dennison.

Q. Where do you presently reside, Mr. Dennison?
A. In Portland, Oregon.
Q. By whom are you presently employed?
A. By Georgia-Pacific Corporation.
Q. And what position do you presently hold with Georgia-Pacific Corporation?
A. I am Vice President of Georgia-Pacific, in charge of the Distribution Division.
Q. When did you first start to work for Georgia-Pacific Corporation, Mr. Dennison?
A. In December of 1961.
Q. Would you now describe for us briefly what your job experience has been at Georgia-Pacific since 1961, and particularly through 1973?
A. Yes. I started as branch manager at the Atlanta, Georgia branch and was there until 1965 as branch manager, at which time I was made regional manager for the Southeast Region, and in April of 1970, I was elected Vice President in charge of Distribution Division.
Q. So you have held the position of branch manager, [10,899] regional manager, and, finally, vice president in charge of the Distribution Division at Georgia-Pacific, is that correct?
A. Yes, sir, I have.
Q. Now, I believe you said you were a branch manager at Atlanta from 1961 to 1965, is that correct?
A. That is correct.
Q. And then you became a regional manager?
A. Yes.
Q. For what region were you regional manager?
A. The Southeast Region encompassing roughly the southeast states.
Q. And that was from 1965 to 1970?
A. That's correct.
Q. How many branches were there in that Southeast Region when you became regional manager in 1965?
A. There were six at that time in the region.
Q. And could you tell us, please, where they were located?
A. We had Atlanta, Mobile, Tampa, Miami, Orlando, and Jacksonville.
Q. Now, when you left that position as regional manager of the Southeastern Region in 1970, how many branches were there in that region?

A. There were 16 and several under construction.
[10,900] Q. So in a period of five years, ten additional branches had been added by Georgia-Pacific in that region, is that correct?
A. That's correct, yes.
Q. Would you tell us, please, what the function of a regional manager of the Distribution Division at Georgia-Pacific is?
A. He is the chief executive for the Distribution Division in the region where he is located.
His responsibilities are marketing, merchandising, sales, operations of that region with the branch managers reporting direct to him.
Q. What is your function as vice president in charge of the Distribution Division?
A. I am in charge of all operations, marketing, sales, merchandising, operations, and the regional managers report direct to me, plus the staff department heads in Portland report direct to me.
[10,901] By Mr. MELLOTT:
Q. All right, sir.
Would you now briefly describe for us in general the business of Georgia-Pacific, as it existed during this period 1965—and I am particularly interested from May, 1965 through 1973.
A. We were engaged primarily in the manufacture and marketing of forest products, but with the addition of some other products such as gypsum, for example.
We marketed roofing and insulation and some metal products and various other things that we didn't manufacture, but we marketed.
Q. Where is the home office of Georgia-Pacific?
A. Our international headquarters are at Portland, Oregon.
Q. Does Georgia-Pacific operate a nationwide business and did it do so during this period, May, 1965 through 1973?
A. Yes, it did. We are nationwide and worldwide, both.
Q. Approximately how many employees did Georgia-Pacific employ in 1973?
A. Oh, it runs between 30 and 40,000, in that range.
Q. Approximately how many shareholders did Georgia- Pacific have in 1973?
[10,902] A. That is a little out of my line, but the best I

remember from reading the annual report, it is about 100,000 shareholders, something like that.

Q. Could you tell us in a little more detail what the product lines of Georgia-Pacific were during this period, May, 1965 through 1973?

A. Well, in a little more detail, we handled 15 to 20 major product lines and I will run through a few of them. Sanded and sheathing plywood, prefinished paneling overlaid plywoods, sidings, imported paneling and lumber, gypsum, insulation, roofing, nails, a few other auxiliary metal products lumber, of course, in great quantities, both domestic and foreign.

Q. Approximately what proportion of the Georgia-Pacific total sales were made up by gypsum sales in this period May, 1965 through 1973?

A. Did you say of the corporate sales?

Q. Yes, of the corporate sales.

A. It runs between, oh, roughly 4 and 8 percent, that general area.

Q. What percent of the total sales of the Distribution Division would the gypsum sales represent?

A. That runs between 8 and 12 percent of the Distribution Division sales.

Q. Approximately how many plants—and now I am [10,903] not talking about just gypsum plants—but how many plants did Georgia-Pacific have during 1965 through 1973?

Mr. FRICANO. Objection as to relevancy and materiality. We are here trying a gypsum case.

Mr. MELLOTT. I think it is significant in this case the extent of the involvement of gypsum in Georgia-Pacific.

The COURT. All right. The objection is overruled.

The WITNESS. We have plants and branches running in the area of 300 and it is about 200 plants, 182, in that general area.

By Mr. MELLOTT.

Q. How many of those plants in 1973 manufactured gypsum wallboard?

A. Ten, I believe.

Q. Mr. Dennison, would you now describe for us briefly what the history of Georgia-Pacific has been, including information as to the production and marketing philosophy of that company during the period of its growth.

A. Just a little thumbnail sketch.

Georgia-Pacific was founded in 1927 in Lynchburg, Virginia, with assets of $12,000. $6,000 of it was [10,904] borrowed, by the way.

And they started out there in Lynchburg and later moved to Augusta, where they were gradually joined by other people who had production facilities.

And then later on in the—oh, along in the early 50's to mid 50's moved to Portland, Oregon, after acquiring some plywood mills out there and some timber on the West Coast.

During this time they adopted the philosophy—it grew out of acquiring production facilities, of trying to run on the basis of full out, 100 percent capacity whenever possible, in order to bring down the operating costs of anything in order to make sure that they had round-the-clock employment and year-round employment.

Then in order to enhance that, they had to go into the distribution business, because they needed branches and warehouses to move this product into when the seasons were off for building and various items like that, industrial seasons off.

This continued as a company philosophy from the beginning of our going into productive capacity and continues to this very day, as a matter of fact, and has, I might say, successfully led to assets of two billion dollars at the end of 1973, roughly.

Q. Now in answer to one of my prior questions, like [10,905] the one I have just put to you, you have referred to this aggressive marketing philosophy in reference to the Distribution Division and the branches. Would you explain a little further how that distribution system of Georgia-Pacific has implemented that policy.

A. Well, the policy is that the manufacturing plants, no matter what they manufacture, can and should operate at their maximum capacity possible year-round, leaving out the factor of seasonality.

Then it becomes the duty of the Distribution Division, as the marketing arm for the company, to sell or store or both the product, but to take it out of those mills and to get it at the place where the customer is going to use it and have it there when he wants it and in whatever quantity he wants it. This is our job as the marketing arm.

Now, in addition to that, we are charged with the responsibility of trying to sell more product than the company can produce, so that the company, in turn, can add to their production facilities. So, therefore, in many products we go to the outside. We buy more products similar to what we make or other products that we do not make. We market these and then if the company decides to then, on the manufacturing end, they catch up to us in that way.

Q. Has the distribution system at Georgia-Pacific [10,906] grown during the period May, 1965 through 1973?

A. Oh, yes, tremendously, tremendously.

Q. Was there an increase in number of branches during that period?

A. Well, in 1965 when I became regional manager, there were 86 branches and at the end of 1973 there were 128 branches and about 10 under construction. In addition to that, we had enlarged many of the branches tremendously and rebuilt a lot of facilities.

Q. So the branches grew considerably during this period 1965 through 1973, is that correct?

A. Yes, yes, they did.

Q. Mr. Dennison, previously we have had introduced in this case Georgia-Pacific Exhibit 50, which represents what is identified as representing the number of branches on January 1, 1969. Do you recognize the locations of the branches on that exhibit?

A. I am sorry. I don't have any peripheral vision.

Yes, I do.

Q. The branches are scattered all over the country, is that correct?

A. That is correct, yes.

Q. In connection with the addition of branches around the country that you have testified to during this period, May, 1965 through 1973, did the trading areas [10,907] served by each branch change during that period as well?

A. Well, yes, because, in effect, when we opened a new branch we were really spinning that branch off of one or more other branches, so the trading area of the original branch or branches shrunk and we made more branches where there were fewer.

[10,908] By Mr. MELLOTT:

Q. Well, why did you do this?

A. Well, there were a lot of reasons, but the principal one was to give us greater market penetration in any given area.

Just for example, if we had a branch at—since we are in Pittsburgh, if I may, I will use Pittsburgh as an example. If we had a branch in Pittsburgh, and one in Philadelphia, and we added one at Lancaster, then, the freight rate to Pittsburgh and Philadelphia from many places might be the same, but we would end up with Lancaster at the same freight rate, so we would, in many cases, get the product to the Lancaster branch, which spun off at the same basic cost as the rail freight. Then, we could bring that product at a more competitive cost or a lower cost to the dealers and, finally, to the end users in that spun-off area. That gave us a better market penetration in Lancaster, for example, and then the branch manager in Pittsburgh had to go on and do something about getting his business back, so he concentrated more, so we ended up with a new branch at Lancaster, and we ended up with a group of men in there—a part of the community knowing the people in the community, and taking their place there in both the business and civic way, so it served many functions.

Q. Do the personnel that are employed at these [10,909] branches usually live in the community where the branch is located?

A. In general, we require that the manager and all of the sales force and the employees live in the branch area, especially those who have automobiles at company expense, so they do live in the branch area. They are a part of the community. They know the dealers. They know the industrials, and that is their job to do that.

Q. All right. Now, by this system that is utilized in the distribution division with branches around the country, the Georgia-Pacific policy of flat-out production and aggressive marketing, has Georgia-Pacific been able to increase its market penetration in gypsum wallboard since May, 1965?

A. Oh, yes, yes, yes.

Q. Now, during this period, May, 1965, through 1973, have the product lines sold by the branches increased in number?

A. Yes, considerably, and they continue to increase virtually every day, not only in the plywood and forest products, but in

all of our other product lines that we decided to handle in order to put more volume through that unit.

Q. Now, Mr. Dennison, you have seen this distribution system from the branch manager level, the regional manager level, and from the level as the head of the distribution [10,910] division. Are the—these other product lines that are sold by the branches sold to the same types of customers and the same customers that use gypsum wallboard?

A. In general, they are. There are a few exceptions, of course, when you get over in the industrial area, but, in general, we call on the same type of person and sell them the same product line; yes.

Q. So many of the customers are the same?

A. Mostly, because we are a little loath to take on a line that doesn't fit in with all the group we are already calling on.

Q. What, if any, advantage is that in connection with the marketing of gypsum wallboard?

A. Well, we have an opportunity to make a full truckload sale to a person where, previously, he could only get gypsum in, perhaps, one straight truckload, but, now, he can get two bunks of gypsum, he can get two bunks of plywood, and some pre-finished paneling, and, most branches, they have their own pricing authority, but most branches do price so a customer can have a full truckload price on all the items, just as if he had bought a full truckload of all of them.

Q. So if he is only buying a fraction of a truckload of gypsum, if he fills out the truckload with plywood or some other material sold by the branch, he gets the benefit—by "he," I mean the customer gets the benefit of the [10,911] truckload price on gypsum; is that correct?

A. Yes. Most branches do this. Of course, there is a side benefit to it. The consumer finally gets the final benefit from it in lower cost.

* * * * * *

[10,913] * * *

Q. Now, in the three positions you have had, ranging from branch manager to vice president in charge of distribution division, since May, 1965, through 1973, would you explain to the jury the pressures that the flat-out production goal and

policy created on you, with reference to efforts to sell gypsum through the branches?

A. Well, the—it is particularly severe, of course, when you come to the off season time, when the plants have no restrictions on them. They are supposed to run to whatever capacity they can manage.

It caused us to be quite innovative in some new marketing and merchandising programs in the branch areas, and these took on all sorts of forms.

For example, where there was no truck delivery, we might elect to start truck delivery, and, in general, we did, and we mixed loads on trucks, as I said before, and then we would run special incentive contests for the dealers. We might give him—every dealer in that whole branch area, we might give him a dollar off if he bought two truckloads.

[10,914] We might put on a giant sales blitz in a particular area, and that might be an incentive to the dealer to buy the gypsum at that time, or it might be an incentive to the salesman to sell the gypsum at that time. He might get a dollar a truckload, something like that. Some branches, on their own, have given away turkeys and hams around Thanksgiving, in order to get the dealer to buy a couple of extra truckloads of gypsum.

So it caused us to have to invent many ways to get the gypsum sold, and then we had to go to special services, such as which we always hoped to get paid for, of course, such as job site delivery and curbside delivery and special equipment to put the gypsum in the buildings, if that is what the dealer or the applicator or the type customer we were selling wanted.

Q. Did some of the methods used by the branches include the lowering of price of the wallboard in order to move the products?

A. Most of the time.

Q. Were branch managers told, and were they told during this period, May, 1965, through 1973, that they had to move the products?

A. They were told they had to move the products, and there wasn't any excuses for not moving it, period.

Q. To what extent, if any, did this policy and this [10,915] practice have a tendency to lower prices at which the consumer purchased gypsum wallboard during this period?

A. Well, it lowered them considerably, because, when we went out with a special, our competitors didn't sit still. They eventually came along and met that special, and, of course, we had lowered the market in the entire branch area, and they would meet it. Hopefully, we had the business that we needed, by then, and could stand a little cessation of business at that point.

Q. Mr. Dennison, during the period May, 1965, through 1973, did the branch managers of Georgia-Pacific have independent pricing authority, with reference to the products sold through those branches?

A. As we integrated the Bestwall gypsum sales into the distribution division, and, branch by branch, as they took over in their areas, the branch manager had total pricing authority in his area for gypsum products. Yes.

Q. And did he have it on the other products which the branch was handling?

A. He did. I might add, there, that all of our divisions are final operations. It is sort of an independent sort of thing. Each division has to operate and make a profit, each branch has to operate and make a profit, each plant is expected to operate and make a profit.

In other words, we have profit centers, and they [10,916] are just like independent businessmen, in those profit centers. They have to take, within broad policy lines, whatever steps are necessary, including pricing or any new and innovative programs that are offered on a corporate level, that they think of themselves or they hear of, to get the job done, and, ultimately, to make a profit on it. So they are really sort of like independent businessmen, with broad guidelines and good financing behind them.

Q. When you say they are like independent businessmen, and operate as profit centers, you are referring to the branches?

A. Yes, yes.

Q. And was this true prior to May, 1965, as well?

A. Oh, yes. We have always operated the branches as profit centers, the mills as profit centers, and each division as a profit center, all the way up and down the line.

[10,917] By Mr. MELLOTT:

Q. And did Georgia-Pacific have the flat-out production policy prior to May 1965?

A. Oh, yes. It grew up with acquiring production facilities all over the country.

Q. And it had branches and a distribution division in operation prior to May 1965; didn't it?

A. Yes, it did.

Q. And the branch managers had independent pricing authority with reference to the products they handled through the branches prior to May 1965; is that correct?

A. Yes, they did.

And they still do.

Q. And so that all that happened as a result of acquisition of Bestwall Gypsum Company is that gypsum was added to the line handled by the branches; isn't that correct?

A. Yes. Just exactly like adding any other product they had complete authority over, where they sold it to whom they sold it, and the territory, and what price.

Q. Was the branch manager's compensation based at all on volume and profit of that center?

A. Well, yes. And I'd like to explain a little bit there.

We have brackets of compensation according to the [10,918] volume size of a branch. And as a branch manager works his volume up, he steps up in the bracket which he fits into for base salary.

Now, in addition to that, he was paid a percentage of his net profit, and he was paid a percentage based on his return on invested capital. So he had three things that he was judged on.

Q. During the period of May 1965 through 1973, were the branch managers judged on individual transactions that they engaged in or on their overall profit performance?

A. Would you explain what you mean by "individual transactions?"

Q. Well, was their performance, was the branch manager's performance judged on the basis of an individual sale, or was it judged on the basis of their overall performance of the branch during a period of time such as a year?

A. Oh, oh. No, they are judged on the bottom line. It is what they come up with in net profit when they are all done, and whether they secured sufficient volume to support this flat-out production theory. And plus that, to support the acquisition of new product lines.

They are judged on the bottom. That's the primary thing we use.

Q. What do you mean by "the bottom line?"

[10,919] A. The final net profit before taxes, after deducting everything else.

Q. And that includes the sales of all of the products that they are handling; is that correct?

A. Everything. Includes their sales and their costs and everything, netted out to the bottom line.

Q. Now, you have referred to the branch's obligation to operate at a profit.

I believe you have also mentioned that they operated like individual independent profit centers, and individual independent businesses; is that correct?

A. That's correct, yes.

Q. Now, do other gypsum manufacturers, to your knowledge, have the branch method of operation?

A. There is one of them now that has it in a small way, a very small way. But when we went into the gypsum business by acquiring Bestwall, to my knowledge there was no gypsum manufacturer who had a distribution system.

Q. Well, by 1973 had any other gypsum manufacturers utilized any features of the branch method of distribution at Georgia-Pacific, or a type that Georgia-Pacific used?

A. Yes. After we integrated the sales of gypsum into the distribution system, we found that our customers were reporting that there were many manufacturers looking around for many ways to counter our competition.

[10,920] One of them in particular was Flintkote, who started to develop a branch warehouse distribution center system. And today they have a few of those around the country.

And then U.S. Gypsum started either acquiring or buying—and I am not clear which they did—what I would call a contractor-applicator type yards. And I believe they finally called them L & W Supply, or something like that.

I don't get out and see those things in the field any more, but they were acquiring those.

And I think they had various names when it started out, and I think it settled down to L & W Supply.

And then we had a report—and I don't think it ever came—I know it didn't come into fruition with the particular company,

but the dealers reported back to us that U.S. Plywood, who is one of our prime competitors in forest products had their salesmen out asking the customers what they thought of the idea of U.S. Plywood handling gypsum. And if they handled it, would they buy it from them. Some of our customers told us they asked them, "Whose?" And they told them "National Gypsum."

So, I don't know whether anything ever came of it, and I don't know how deep it was, but this is what we were told by customers.

[10,921] They were looking for ways to counter the distribution system, I am sure.

Q. Now, prior to May 1965, were the salesmen who were located in the branches calling on customers that were buying gypsum wallboard from other suppliers?

A. Yes. We had a full sales force, a large sales force, both inside and outside And they called on every lumber and building material dealer in the country that we knew of—and that if they didn't, it was because they forgot somebody.

And, actually called on what I would call a kind of a hard goods material dealer, because we sell and did sell them, and still do, sell concrete forms, and most hardgood dealers either sold concrete form along with the cement and gypsum and other things they sold, or else we were always trying to get them to sell it if they didn't already do it.

In many cases we were successful in getting them to do it where they didn't previously.

Q. So, it is correct then that at the time that Georgia-Pacific acquired Bestwall the salesmen in the branches already had contact with customers for gypsum wallboard?

A. Oh, yes. Yes, yes.

We were delivering to those same customer's practically [10,922] daily.

Q. Now, in connection with some of your prior answers you have mentioned the warehouse base at Georgia-Pacific branch operations, and I would like to focus on that at this point.

Would you tell me please, how the warehouse operation worked at a branch, and the significance of warehousing of products at the branch operation? What importance is that in connection with marketing products, and particularly gypsum wallboard?

A. Well, with gypsum, and virtually everything else—but I will stay with gypsum for a minute—the dealer wants to buy at the lowest price possible and the smallest quantity, so he doesn't have inventory dollars tied up and space tied up in his warehouses, and he doesn't have the risk of fall-down or damage to the material on hand.

So, our warehouses are set up to try to provide just exactly that service to give him the opportunity to buy in mixed truckloads, or straight truckloads, or full carloads, whatever he chooses. And, depending on the size of his business, to give him an opportuntiy to serve the whole trading area that he is located in.

It gives him, the little dealer, a chance to compete with the big dealer who is buying direct carloads. And I think, consequently, it brings the product to the [10,923] .onsumer at a lower price.

At least that's our thought on it, and I think it has worked out that way.

Q. Was the warehouse space at many of the branches increased by Georgia-Pacific after the acquisition of Bestwall?

A. Yes.

We were growing at the time, and the program stepped up as a result of the Bestwall activities, as well as some other activities that we were expanding at that time.

Q. Now, insofar as gypsum is concerned, after the branch operation came on-stream in the handling of gypsum following the acquisition of Bestwall by Georgia-Pacific, would you describe for us the different levels, the functions and types of competition that the branch would engage in with respect to the sale of gypsum products in marketing area?

In other words, what levels of competition did the branch engage in with reference to gypsum wallboard?

A. Well, they sold direct cars to major factors, such as lumber and building material dealers.

They sold to hardgoods material dealers out of warehouse, direct cars, whatever way the customer wanted to buy, depending on his size.

[10,924] They sold in some areas where it was necessary, in order to secure full market penetration, to contractor applicators both large and small. Those contractor applicators in turn usually sold to the consumer-owner type person. They sold

delivered job site, if necessary, either for the account of the dealer or the builder, or directly to the contractor-applicator.

They sold at curb-side. They sold it in any manner necessary in order to get the job done, penetrating the market and getting their place in the marketplace. And that's pretty well true of all the products.

Q. Did the branches compete with the manufacturers of gypsum wallboard in the sale of products to the dealers that you referred to?

A. Well, yes; because what it managed in effect is here with Bestwall Gypsum with, I believe, nine plants—something like that when we acquired them—and now all of a sudden instead of nine plants to ship from we have provided nine plants plus 86 branches. So that effectively there were 95 locations from which a customer could get full truckloads, two truckloads, whatever he needed, because we began putting it on hand at every branch. This wasn't overnight, but this started immediately.

[10,925] By Mr. MELLOTT:

Q. Do the branches also compete with the dealers in the resale of the product to the next level of distribution?

A. Yes, in the market where a dealer can't or won't handle gypsum or isn't, or we can't get our market penetration through that method of operation, we will then go direct to the applicator or contractor and sell him in order to get the product into the market and get it to the job site.

Q. All right. What, if any, types of services have the branches utilized in the period from May, 1965 through 1973, at times during that period which allows the branches to penetrate particular markets for particular classes of customers?

A. Well, for one thing, they backhaul out of the gypsum mills, if they're close enough to do it with their own trucks, and then go direct to a job site with their own trucks.

They have added specialized equipment for hauling out of the branch to the job site so that they can put the gypsum in the windows of the building under construction, or they have trucks that are equipped to set the gypsum down at curb side, if that's the way it is wanted.

Then, they have arranged with the plants to have [10,926] one of their own branch trucks with this type equipment on it follow a plant truck to the job and unload the plant truck,

and then unload their own truck, and then go on with it that way.

They have used many innovative methods, and hopefully they got paid some extra money for this; in many cases, they did. But is was innovative in that it brought the product to dealers who—and customers who either couldn't or didn't want to handle it in the traditional manner that it was handled when we acquired Bestwall.

Q. What types of problems did these special services of Georgia-Pacific and Georgia-Pacific's move through the branches into the various submarkets that you have referred to create for Georgia-Pacific's competitors in the gypsum business?

A. Well, it created a tremendous amount for them. They needed to react and after a short period of time they began to react, I might add.

I think probably the most telling reaction was the acquisition of retail outlets by U.S. Gypsum, perhaps, but all of the reactions caused more and more competition to what we had already offered as competition in the marketplace.

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[10,956]

By Mr. MELLOTT:

Q. Mr. Dennison, have you supervised the location of the display items on that chart?

A. I have, yes.

Q. Was there any attempt to put those display items on there to scale?

A. No, they are not to scale.

Q. Would you now please tell the jury what that reflects with reference to the method of distribution in the gypsum industry?

A. Just prior to the acquisition of Bestwall by Georgia-Pacific Corporation—actually, this represents market research done primarily in the southeast just at the time of the acquisition of Bestwall by Georgia-Pacific. And in talking to the regional managers in other areas, we found this to be approximately the same in the other areas. This chart represents competitors of Bestwall as "A" and Bestwall as "B" here.

Now, this method of marketing that was used by both of these factors was that there was shipments by truck and by car direct out of the plant of competitor A and out of the Bestwall plant to what we will term here as hard goods dealers which I referred to yesterday, and they primarily handle gypsum and, oh, bricks and cement, things [10,957] of that sort, but they do handle a little bit of the concrete forms to go with their other products. So the distribution was to them and to the lumberyards, who some of them handled gypsum and wood products. Of course, they all handle wood products because they are lumberyards. But some of them handled gypsum. That seemed to be a dwindling part of the operation, and that it was getting heavier to this sort of distribution.

Now, these people sold then to the small contractor-applicator who in turn sold over here to the owner-user, whatever method was used to construct buildings or remodel or repair them.

Now, I set this contractor-applicator down here away from that one representing a large contractor-applicator for a reason. Our market research showed that there was some evidence which we were unable to prove, however, that there were sales direct from these mills to the contractor-applicator. But in every case where we felt we got the exact facts, we didn't find that those sales went to that large contractor-applicator without one of these factors up here participating in some way in the sale, whether it be a small percentage of the sale, or a dollar or two per thousand on the gypsum. So rather than to say that that was happening, we put him over here and made a contractor-applicator on it.

[10,958] But we do know that there were many sales from these two factors to the large contractor-applicator, and then in turn to the building owner or the user or to the occupier of the property.

Now, this is the way the market looked when we did our original market research.

Q. Excuse me, Mr. Dennison.

What is the difference between the contractor-applicator indicated at the top and the one indicated at the bottom? You may have indicated that as being a difference in size. But I would like you to mention that again specifically.

A. Well, its size and scope. This contractor-applicator usually is small in size and his scope is limited mostly because of credit problems. He is not as well financed as this large contractor-applicator is. There wasn't near the credit problems looming here with that type of company.

Q. Now, just prior to the acquisition of Bestwall Gypsum Company by Georgia-Pacific, did Georgia-Pacific have a distribution system with branches in operation?

A. Yes, it did.

And, Mr. Kosinski, if you would put the Georgia-Pacific distribution center in there, and also show the products that we were handling then primarily which were [10,959] wood or forest products—we did handle some roofing and insulation and things like that, but for the purpose of this chart we have only shown the wood.

Q. Now, to what customers were you distributing those products at that time?

A. O.K. This branch system—and, incidentally, will you put up here, Mr. Kosinski, the number of branches that existed in 1965.

Yes, thank you.

86 branches existed in 1965. Now, these branches delivered wood products, and the other products we carried, to lumberyard building material dealers. I have only called these lumberyards because in general most people know a building material dealer as lumberyard a little better than they do as a building material dealer.

But to the lumberyards, and to those hard goods dealers, as I said before, we sold to a strictly hard goods dealer concrete forms, or we tried to. So we were selling and delivering to them in full truckloads or mixed truckloads, whatever way they wanted to buy it.

Now, it also happened that we were selling to this contractor-applicator, but a different type of product in gypsum, of course, because, again, he used some items that we sold. We called on him and sold him items such as floor underlayment when he had the occasion to use that [10,960] sort of thing.

We also called on the large contractor-applicator, but we did not have as much to sell them at that time as we did after we took on Bestwall Gypsum, by integrating that into the distribution system.

[10,961] By Mr. MELLOTT:

Q. So, Mr. Dennison, what you now have displayed on there indicates the location of the Georgia-Pacific branch in the distribution system just prior to the acquisition of Bestwall by Georgia-Pacific; is that correct?

A. Let me say prior to and just as we were acquiring it. This market research was done in the formative stage of the acquisition.

Q. All right.

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[10,962] • • •

By Mr. MELLOTT:

Q. Mr. Dennison, were the Georgia-Pacific branches [10,963] calling on the same types of customers prior to the acquisition that the gypsum manufacturers at that time were calling on?

A. Yes, they were. And some added.

Q. And were some of them actually the same customers?

A. Yes, they were.

Q. Now, would you show us, please, what happened after Georgia-Pacific acquired Bestwall and the gypsum sales were integrated into the distribution system of Georgia-Pacific.

A. Sure. Okay.

Would you change this to a Georgia-Pacific plant now, please.

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[10,964] • • •

By Mr. MELLOTT:

Q. Would you continue, Mr. Dennison, please.

A. Okay.

Mr. Kosinski, would you put aditional warehouse facilities at the gypsum plant.

Now, we still have the same. We have converted this to a Georgia-Pacific-Bestwall Gypsum plant, and we have added some warehouse facilities at this point.

Now, let's show now next the Georgia-Pacific [10,965] lines going out here. But this time we are going to the branch. That's right. Okay.

Now, at this point I want to show that the Georgia-Pacific sales were being integrated into the branch. In other words, the salesmen who had originally worked out of the plant locations

were now moving over to work out of branch and regional locations. And they then started shipping into branch as well as making direct shipments up here to these people.

So, if you will show Georgia-Pacific green lines up there, please.

The green lines are representing Georgia-Pacific, and blue lines out of the plant represent competitors.

Q. Mr. Dennison, at this point the gypsum is being handled by the branch; is that correct?

A. It is being integrated into the branch system. The salesmen and the movement of the product going through the branch system, and the salesmen who were over here, now are moving into the branch.

Mr. MELLOTT. Mr. Kosinski, would you put some gypsum in the branch, please.

The WITNESS. Now, at this point what we have—and let's move ahead to 1967, because this is taking place over a period of two years as we are integrating these. Let's put the 1967 branch number on there.

[10,966] That's fine.

Now, at the end of 1967 we had 100 branches.

Now, here is what is happening at this point: The salesmen had moved in here, and they are working out of here calling on these people. They are calling on those people. They are calling on those people.

Now, that wasn't true in every single branch area, but in many of them they called on contractor-applicators to sell them as well as to promote the product. Where we weren't actually selling the contractor-applicator, we were still promoting the product to that group of people.

All right.

Now that gives us this sort of a competitive position. Nine or ten gypsum plants, plus warehouse facilities at the gypsum plants, plus 100 branches with storage facilities. And those 100 branches could then deliver to all of these factors either truckloads, partial truckloads, mixed truckloads out of the branch, or they could ship it out of the gypsum plant direct.

Whatever service the customer needed, or whatever service the branch manager had to think of in order to compete. And, more importantly, in order to move his allocation of gypsum.

By Mr. MELLOTT:

Q. Now, you mentioned mixed truckloads. What did [10,967] you mean by that, Mr. Dennison?

A. Well, this small contractor-applicator, for example—I am sorry if I am in anybody's way, but I don't have any sight out of this side. I have to get in front of it.

But, this contractor-applicator, even though he was small, he didn't have to take wood, one bundle at a higher price. He could get wood and gypsum, if that were his choice, on the same truck at a truckload price. He didn't have to buy a whole carload of gypsum in order to get some 14 or 16-foot board. We'd send him a bundle of gypsum out of warehouse whatever length he needed. That kept him from having fall-down and breakage in his store.

Consequently, in the long run, it saved him money not only on that, but on the fact that he didn't need as many storage facilities as he had previously.

So, here we had a better service out of the branch or out of the gypsum plant. This is what condition follows—competition that we gave is what caused our competitors to have to react in some way in order to offset that or try to offset it.

Q. Now, I believe you testified yesterday that the branches continued to increase; is that correct?

A. Yes, they did. And by—oh, 1973—let's take the number of branches there, 128 by then. By the end of [10,968] 1973 we had 128 branches. Of course, we have continued to expand those.

Q. We are only——

A. But, of course, I think your questions were only——

Q. Yes, we are only interested in 1973.

Mr. MELLOTT. May I have the photograph, Mr. Kosinski, please.

By Mr. MELLOTT:

Q. Now, did Georgia-Pacific at times also make shipments direct to the large contractor-applicators?

A. Yes, they did.

Q. So that would be direct line shipments from the plant to the larger contractor-applicator; is that correct?

A. The branch salesman who is now working out of the branch sold it. But it would ship direct from here over to here.

If you have enough of those, Mr. Kosinski.

Mr. MELLOTT. Mr. Kosinski, do you also have the photographs for the first position?

[Mr. Kosinski hands photograph to Mr. Mellott.]

Mr. MELLOTT. Here are the photographs, Your Honor, which we have taken of the three basic positions.

The COURT. All right.

Would you mark those with an exhibit number and "A" and "B" and so on.

[10,969] Mr. MELLOTT. I could mark these Exhibits 20 A, B, C, D, E, and F.

The COURT. That's what I had in mind.

Mr. MELLOTT. All right, Your Honor.

The COURT. Are you prepared to offer them?

Mr. MELLOTT. Yes.

The COURT. Have them marked and offer them.

Mr. Fricano, do you want voir dire?

Mr. FRICANO. Yes, sir.

Mr. MELLOTT. They will be Georgia-Pacific Exhibits A through F.

The COURT. What did I say?

Mr. MELLOTT. Well, I forgot to say "Georgia-Pacific." It was my mistake.

The COURT. All right.

They will be marked with those numbers on.

Mr. Fricano.

VOIR DIRE EXAMINATION

By Mr. FRICANO:

Q. Now, down here originally you had Bestwall, didn't you?

[10,907] A. Me?

The COURT. Yes. You are the witness, sir.

The WITNESS. I didn't know the meaning of the word.

The COURT. Be sure and speak loudly enough. There is a microphone right there if you want it.

Mr. MELLOTT. Mr. Dennison, would you stand over there so the jury can see you.

That's better.

The COURT. Mr. Mellott, there is a microphone there. Mr. Dennison can take it in his hand and use it if he wants to.

JURORS. We can hear him.

The COURT. All right.

I want to be sure the jury hears.

By Mr. FRICANO:

Q. Now, you have this truck, and of course you had a train. You had a train, too, I reckon, taking gypsum—We will take this down for a moment.

With the exception of this one, 1965, 86 branches you had. You had Bestwall delivering gypsum up through the dealer over to the contractor-applicator to the ultimate user. You also had it going down here to the contractor-applicator; did you not?

[10,971] A. I didn't have these lines.

Q. We will take those off then, sir.

A. Okay.

Q. Now, you left something out in the middle; didn't you?

A. I didn't have this up here.

Q. No. I put that there. That's what you left out; isn't it?

A. Georgia-Pacific——

Q. Sure.

A. Do you mean Georgia-Pacific existed?

Q. Oh, no, sir. Georgia-Pacific not only existed, but it had 86 branches in 1965 that were selling gypsum to all these people; were they not?

A. No, that's not correct. Indeed not.

Mr. FRICANO. May I have your Annual Report? Mr. Grainer, may we have GX 5085, please.

The WITNESS. Perhaps I can save you digging a little bit, Mr. Fricano.

If you are going to ask me if at the end of 1965 Georgia-Pacific had sold gypsum, it had. Because, if you recall, we bought the Bestwall Gypsum Company in 1965, I think along about April or May. So, indeed Georgia-Pacific had sales in 1965 of gypsum.

But the question that was originally asked is: [10,972] "How did this look when our market research started as we acquired Bestwall?" And these branches existed, but they did not sell Bestwall gypsum.

By Mr. FRICANO:

Q. They didn't?

A. They did not.

Q. Would you please look at Government Exhibit 5085, sir.

Mr. FRICANO. If Your Honor please, may I approach the witness?

Mr. MELLIOTT. Would you please tell us what you are referring to?

Mr. FRICANO. I am referring to the cut-out section, the insert section.

By Mr. FRICANO:

Q. Mr. Dennison, I am pointing at sales mix right now for 1970 and it shows——

The COURT. What year?

Mr. FRICANO. 1962 through 1971, Your Honor.

The COURT. All right.

By Mr. FRICANO:

Q. Which would span the Bestwall acquisition.

Now, under sales mix what am I pointing at there. What does it say?

[10,973] A. Are you asking me what the sales mix applies to? It applies to corporation, by the way.

Q. Yes, sir.

And it says "Gypsum;" does it not?

A. Yes, it does.

[10,974] By Mr. FRICANO:

Q. And it says gypsum in 1962, does it not? Follow it straight across and what percentage of your total mix was gypsum in 1962, Mr. Dennison?

A. I think if you will go back and read the data that went into that, you will find out that all, all of these things are restated to account of acquistion. It is typical when you acquire a business to go back and restate what would have happened in prior years, if you had owned that business. As a matter of fact——

Q. Show that to me in this annual report.

A. I am not an expert on annual reports.

Q. Do you know Mr. McCaskill?

A. Yes, sir.

Q. Mr. McCaskill testified in this case that the Georgia-Pacific——

The COURT. Now wait a minute.

Mr. FRICANO. There is evidence in this record——

The COURT. I said you can't do that and don't do it.

By Mr. FRICANO:

Q. Is it your testimony that Georgia-Pacific did not sell gypsum products prior to the time of the Bestwall acquisition?

[10,975] A. It is my testimony, very clearly, that Georgia-Pacific branches did not sell gypsum in any quantity. It was accidental, if they had some.

Q. Notwithstanding your 1971 annual report shows in 1962 your total product mix was 10 percent gypsum; 1963, 9 per cent was gypsum; 1964, 9 percent was gypsum; 1965, 7 per cent was gypsum and so forth?

Mr. MELLOTT. I object to that question, Your Honor, as being a misstatement of what is in the annual report.

The COURT. The witness has testified as to his understanding of what that means and the jury has heard.

Mr. MELLOTT. All right, Your Honor. I will withdraw the objection.

By Mr. FRICANO:

Q. So wouldn't it be fair, sir, even if by accident you had sold some gypsum, that you should have had that Georgia-Pacific truck right here in 1965, pointing in every direction?

A. No, no.

Mr. Fricano, let me explain one more time, a branch manager is a rather independent businessman. I am saying that we did not list gypsum as a product of the Georgia-Pacific branches in 1964.

[10,976] As a matter of fact, we didn't even list it as gypsum product in 1965. We merely listed it as Bestwall as an add-on, because it was added on during 1965.

As a matter of fact, the sales through the Distribution Division were relatively negligible, as we got started up in 1965. It takes time to integrate people into an organization without losing them, and without losing jobs, so we didn't do that.

I am saying the usage of gypsum was so insignificant that you and I could probably haul it out of this courtroom on a truck.

Q. Mr. Dennison, I have heard your explanation, sir.

Would you take a moment and examine your annual report and show me where in this annual report it shows that those figures are restated back to 1962?

The COURT. Well——

Mr. MELLOTT. If the Court please——

The COURT. I don't care. The man has testified and the jury has heard it.

Mr. MELLOTT. And there is a stipulation in this case which the Government has agreed to, and which all counsel entered into, which says from May, 1965 through December 27, 1973 Georgia-Pacific Corporation was engaged in the manufacture and sale of gypsum board and [10,977] other products in various states of the United States.

The stipulation also—which was agreed to by Government counsel, states in paragraph 2 Bestwall Gypsum Company was acquired by Georgia-Pacific Corporation from Certain-teed Products Corporation on April 28, 1965.

The COURT. Well——

Mr. FRICANO. That has nothing to do with this, Your Honor.

The COURT. One way or the other, you have asked the witness a question and he has answered you in his opinion. We are not going to sit him down to review an annual report.

Mr. FRICANO. May I just consult my notes for a moment, Your Honor?

The COURT. Yes.

Mr. MELLOTT. Also, Your Honor——

The COURT. Well——

Mr. MELLOTT. I just want to show what is in the stipulation.

Schedule C of the stipulation, which lists the gypsum sales of Georgia-Pacific, in which the Government has entered into, indicates no sales in 1960, 1961, 1962, 1963 and 1964.

Mr. FRICANO. If Your Honor please——

The COURT. That is in the stipulation?

[10,978] Mr. FRICANO. That is so misleading, it is incredible. I would like to address myself to this, Your Honor.

The COURT. Do you want me to read the stipulation?

Mr. FRICANO. We only indicated, as counsel well knows, it indicates the manufacturers in this case and it wasn't—and to construct a universe and it was not with respect to buy-sell at all, Your Honor, not at all, Your Honor.

Mr. MELLOTT. If Your Honor please, paragraph 19 of the stipulation reads as follows:

> The total annual sales in dollars of gypsum board by the corporations listed on Schedule C were as set forth thereon.

The COURT. All right.

If you stipulated—can I see that? Do you question that?

Mr. FRICANO. I question counsel's interpretation. It is not within the spirit——

The COURT. We will go on my interpretation, Mr. Fricano.

Mr. FRICANO. Of course, Your Honor.

Mr. MELLOTT. It is the last paragraph of the stipulation that I just read, Your Honor.

[10,979] The COURT. Where is the page?

Mr. MELLOTT. May I find it?

Paragraph 19, Your Honor.

Mr. FRICANO. If Your Honor please, I just ask you consider when this stipulation was entered into, it was contemplated we were talking about manufacturers.

The COURT. It doesn't say that. It says total annual sales in dollars of gypsum. It doesn't talk about buy-sell. It doesn't talk about manufacturing. It says as set forth in Schedule C hereof.

That is conclusive as far as this trial is concerned.

Mr. FRICANO. If I understand correctly, Your Honor, other counsel have said—Mr. McSweeney, I think on one occasion and I think Mr. Mallin, if there is something inconsistent in that stipulation that was entered into, and the true facts which would change that stipulation could be shown, all counsel would agree to the change.

The COURT. We haven't——

Mr. FRICANO. I am sorry, sir.

The COURT. We have not heard anything like that. You have said you disagree with the stipulation. You said you disagree with the witness, but [10,980] that is for the jury to determine. He has said—he has testified. Now we are not going to have an argument back and forth. You heard his testimony and the jury has heard it. If it has any relevance in the case, it is up to them to decide.

Mr. FRICANO. I would move to strike the exhibit on the basis it is not truly representative of what was happening in 1965.

The COURT. The motion is denied.

Mr. MELLOTT. If Your Honor please, may we have a few minutes to take that down?

The COURT. Yes.

Be sure to have the pictures marked by the clerk.

Mr. MELLOTT. I will have them marked.

The COURT. The jury will have them, the pictures, and you will recall they showed various stages. You have heard the examination by the Government which contests the accuracy of the chart. You have heard the testimony of the witness. You will have to decide whether it does portray the condition as set forth and what, if any, inferences are to be drawn if it does or doesn't.

Mr. FRICANO. If Your Honor please, could we take a picture of this chart as I have reconstructed [10,981] it for the year 1965?

The COURT. Is it different from these pictures?

Mr. FRICANO. Yes, Your Honor, it certainly is.

The COURT. You have a camera available?

Mr. FRICANO. No, Your Honor. I thought I might borrow the Court's. I will pay for it.

Mr. MELLOTT. I am perfectly willing to set this up——

The COURT. Can't we set it up——

Mr. MELLOTT. We can leave it that way.

The COURT. Can't we set it up someplace else outside the courtroom and Mr. Keene and yourself can take pictures of it?

You don't have to pay for it. Your client has already paid for it.

Mr. FRICANO. Thank you, Your Honor.

Mr. MELLOTT. I believe Mr. Fricano has added something else to the chart since his interrogation of the witness.

Mr. FRICANO. If I understand it correctly, back in 1965 when Georgia-Pacific had branches, [10,982] they also had warehouses.

The COURT. All right.

Is that what you put on?

Mr. FRICANO. Yes, Your Honor, just the warehouses.

The COURT. Will you see that Mr. Fricano has a camera and a flashbulb and some film to take a picture of that during some recess? It is not going to be changed any more, so you can do it during some recess.

Mr. FRICANO. Yes, Your Honor, and as I look at the chart, I would respectfully request to add one more thing to it, and that is the wood products which they were predominantly selling, according to Mr. Dennison's testimony and other testimony this morning.

The COURT. All right.

Mr. MELLOTT. If the Court please, there is no testimony supporting the chart on the basis on which it is now.

The COURT. He just wants a picture of it and we will let him take it. I don't know what he wants it for.

Mr. MELLOTT. May we have a few moments to take it down and get the court reorganized?

The COURT. Yes.

[10,983] You know that I have not held the Government to the strict terms of that stipulation. I have not held the Government to the strict terms of that stipulation, but have instead stated the witness's testimony will be considered by the jury.

Mr. FRICANO. Thank you, Your Honor.

The COURT. The jury will bear in mind there was a stipulation which means an agreement between counsel, but the Government now contends there is something that causes that stipulation no longer to be totally accurate and you can consider that.

[10,984] The COURT. I hope everybody understands. I do not mean by that ruling to say that we do not strictly apply and enforce stipulations. All I am saying is that if the evidence indicates that something which was stipulated to is not accurate, then we would be really sticking our heads in the sand and saying that, even though it is not accurate, we are going to hold to it. But unless such a situation does occur, anything which is stipulated to can't be contested.

Mr. MELLOTT. I think I have everything back in order, Your Honor.

The COURT. All right. Proceed.

Mr. MELLOTT. Your Honor, before I resume the questioning of Mr. Dennison, I would like to read the footnote that is on the statistical page that Mr. Fricano referred to from the 1971 annual report of Georgia-Pacific, Government Exhibit 5085.

At the bottom of the page, which contains the figures which Mr. Fricano read, appears this statement:

> Restated where significant to include companies whose interests have been pooled with the corporation.

By Mr. MELLOTT:

Q. Now, Mr. Dennison, would you please describe to the jury the process of integration that took place with reference [10,985] to the movement of the gypsum sales from the division

that had been acquired and formerly been the Bestwall Gypsum Company into the distribution division of Georgia-Pacific?

A. Yes. We started out, at first, to try to help them move the gypsum by being a joint sales force. But after a month or two, it became obvious that we were going to have to integrate the sales force into the distribution division sales force. So we began, at that point, to bring the gypsum division sales people into the branches and, where possible, assign them full line duties. In other words, they became full line salesmen. They sold gypsum and paneling and plywood and underlayment, all the other things that we sold through the branches.

In this way, they began to take their place beside our regular line sales people. Some of them moved to inside sales jobs or operations jobs, where their talents were peculiarly slanted in that manner. Then, some of them, who were very talented in marketing and merchandising techniques, were made gypsum specialists in various branches. And then others, we made a gypsum sales manager for the region, so that we had a regional gypsum sales manager who had a joint responsibility, although, in most cases, by the time the integration was finished, he was actually an employee of the distribution division. He also reported trends in the marketplace to the gypsum division sales force, [10,986] which, by that time, was a liasion type force between the mills and the distribution division managers, branch and regional managers, that is.

Mr. MELLOTT. Mr. Grainer, may the witness have Georgia-Pacific Exhibit 64, please?

This is a document that has been introduced in evidence, Your Honor.

[An exhibit is handed to the witness by Mr. Grainer.]

By Mr. MELLOTT:

Q. Mr. Dennison, will you tell us, please, what that document, Georgia-Pacific document 64, is?

A. It is an inter-office memo from me to W. H. Hunt, and it has a carbon copy to Mr. H. E. Sand.

Q. And does it report on the status of the integration program taking place at that time in the distribution division?

A. It is written on May 10, and it is the status of the integration as of March 1, 1966.

Mr. MELLOTT. If Your Honor please, I would like to read just some small parts of this document.

This document is dated May 10, 1966, and entitled, "Bestwall Gypsum Division," from Mr. Dennison to Mr. W. H. Hunt.

> "On March 1, 1966, we made the following moves toward integration of the sales of the Bestwall [10,987] Division and the Distribution Division:
>
> #1. The Bestwall salesman in the Mobil area was integrated into the Mobil branch, and he now sells all products.

Mr. DELONE: Mobile.

Mr. MELLOTT. I am sorry. Mobile, Thank you, Mr. DeLone.

Then follow several other paragraphs reporting on other integration progress, and I will read the second paragraph on page two.

> Even though these changes have only been in effect approximately two months, we can already see some good results from them. Detailed figures for Bestwall sales broken down in the way the territories are now constituted are not available, but the managers, as well as the Bestwall regional sales manager, tell me we have a better performance this year than last year. The standard for the Southeast region has been made and exceeded through the 17th week of the year. Based on Bestwall's projected quota through the 17th week, we stood at 125 percent of quota.

By Mr. MELLOTT:

Q. Mr. Dennison—

Mr. FRICANO: Excuse me, if Your Honor [10,988] please. Would Mr. Mellott please read subparagraph No. 4 on the first page, or I will read it if——

Mr. MELLOTT. I will be glad to read it. Paragraph Number 4.

> The Bestwall regional sales office was transferred from Brunswick to the Atlanta distribution center. The Bestwall area sales office, which was located in a seperate place in Atlanta, also was transferred to the Atlanta distribution center. In this transfer of the two Bestwall sales offices, we were able to reduce the clerical force they had by three persons. We also reduced the Bestwall credit department by one person and combined it with

A. I don't believe I have the figure for the total gypsum there in an exact basis. It runs between 80 and 90 per cent and has since we substantially completed integration.

Q. Since the early part of 1968 or the end of 1967, between 80 and 90 percent?

Mr. FRICANO. Objection. There has been no foundation in the record for the way counsel is asking the question.

Mr. MELLOTT. I just——

Mr. FRICANO. I think he got confused, or I did.

Mr. MELLOTT. I may have.

The COURT. Start again, Mr. Mellott.

By Mr. MELLOTT:

Q. Just to make it clear, for the period when the integration of sales was substantially completed by the end of 1967, or the early part of 1968 as you have testified, through 1973, approximately, what percentage of total sales of gypsum wallboard on an annual basis were made by Georgia-Pacific through the Gypsum Division?

A. O.K. That was 80 to 90 per cent.

Q. I said Gypsum Division. I meant through the Distribution Division.

[10,992] A. I understand. Through the Distribution Division of gypsum sales from the period from when we were substantially integrated through 1973. That is 80 to 90 per cent.

Q. Through the Distribution Division?

A. Yes.

Q. Now, what was the balance of 10 to 12 per cent of gypsum sales being made by Georgia-Pacific during that period of time?

A. Well, the Gypsum Division did sell and still sells direct on its own agricultural gypsum and some industrial gypsum, and then through 1972 they were selling directly to Johns-Manville. We asked them to cancel that contract, which they did, and I believe that was the end of 1972 that they canceled that.

Q. All right.

Now, Mr. Dennison, would you describe for us examples of some of the techniques used by Georgia-Pacific and its branches in order for the branches to obtain gypsum sales and penetrate the market during the period of the integration process?

the distribution division credit set up for both the Southeastern region and the Mid-Atlantic region.

By Mr. MELLOTT:

Q. Now, in the part that I had read previously, there is a reference to the fact that, based on Bestwall's projected quota through the 17th week, we stood at 125 percent of quota.

What did that mean, Mr. Dennison?

A. They had mill quotas, which were passed along to their sales force. As a matter of fact, their sales force was an integral part of their mill operations. And we found that to be true of virtually all the gypsum companies [10,989] when we first acquired Bestwall. That sales force was given a quota, and that was the expected production of that mill. And this indicates that we had exceeded that quota that they had by 25 percent.

[10,990] By Mr. MELLOTT:

Q. All right, sir.

There is one final part of this letter that I would like to read.

> A further benefit would accrue to the entire company by having all of the personnel selling and promoting——

Mr. FRICANO. If Your Honor please, may I ascertain where Mr. Mellott is reading from?

Mr. MELLOTT. I am sorry, Mr. Fricano. It is the last sentence of the letter on page 3.

> A further benefit would accrue to the entire company by having all of the personnel selling and promoting all of the products of Georgia-Pacific that are now handled by the Distribution Division and the Bestwall Division.

By Mr. MELLOTT:

Q. Now, Mr. Dennison, when was the process of integration of gypsum sales to the Distribution Division substantially completed at Georgia-Pacific?

A. It was substantially completed by the end of 1967, first part of 1968.

Q. Approximately what percentage of the total gypsum sales made by Georgia-Pacific by the early part of 1968 or the end of 1967 were being handled and sold [10,991] through the Distribution Division?

A. Yes, it was a rather difficult period because of the people involved in it. And we tried to put the people together in the most effective way and the least harmful way, and I believe we accomplished that by providing for everybody who wanted to be provided for in some [10,993] other location. But as we began to get into the integration of sales, and the request by the Gypsum Division was for us to handle more and more of the product because they were beginning to produce more, we had to go to allocations in some cases to the branches and give them some ideas on how to move it, but mostly it was left to the fertile imagination of the branch manager on how to move it.

Now, when he had a buildup of allocation that wasn't moving, he had to go out and institute some sort of a marketing program that would move it. First, of course, he tries the normal standard marketing ways. He would advertise, promote, to the dealers, to the applicator-builders, whatever class of trade, to whom he was selling.

If that failed to move it, he would then, perhaps, go to something like a blitz. He would send in some people to help him from the regional office, and he would mount a giant blitz in his territory. By a blitz we mean that every man on the phone, every woman on the phone that day calling out to the customers or answering an inbound call and asking the customers about buying some gypsum. And every outside sales representative made that his first subject when he walked into the place of business. He asked them about gypsum. He offered to sell him partial trucks at truckload prices if they would finish out the truck with some other product. Then he would have perhaps [10,994] the gypsum sales manager from the regional office helping him by calling on some of the larger factors in the market with him. And, as I previously testified, some of the managers even gave away a turkey or a ham with each truckload that the customer bought.

In one instance, in a certain market, we had problems with the people having the proper joint cement mixing facilities. So the manager arranged through the regional office to buy mixing vats for his markets and offered the mixing vats at cost if they bought the gypsum and the joint cement product together with it. He used every technique known to mankind, and he offered additional services if necessary.

Q. To what extent do these techniques also include reduction in price?

A. Well, the reduction in price normally went along with the blitz. You have to have a little more than the request to buy. You have to have an urgent reason to buy, and the most urgent reason to buy anything at any time is because there is a sale on. And we put a sale on for a week or two, and people find it difficult to resist a sale, I think, because it saves them some money.

Q. Mr. Dennison——

The COURT. We are going to have a ten-minute recess at this time.

[10,995] Mr. MELLOTT. All right, Your Honor.

[Recess taken.]

[10,996] By Mr. MELLOTT:

Q. Mr. Dennison, you have in front of you Georgia-Pacific Exhibit 61?

A. No, I do not.

Mr. MELLOTT. Mr. Grainer, may he have Georgia-Pacific Exhibit No. 61?

The WITNESS. Thank you.

Mr. MELLOTT. This document is also in evidence, Your Honor.

By Mr. MELLOTT:

Q. Mr. Dennison, would you tell us, please, what Georgia-Pacific Exhibit 61 is?

A. It is an inter-office memo from me to H. E. Sand, dated November 25, 1968, and, it is a market report for the week ending November 23, 1968.

Mr. MELLOTT. With Your Honor's permission, I would like to read this document to the jury.

It is a short document, dated November 25, 1968, from Mr. Dennison to Mr. H. E. Sand. The subject: "Southeastern Market, Week Ending November 23, 1968."

> Volume and profit were about even with last week's performance, except in the case of softwood plywood, which showed some increase in profit due to the market strength.
>
> We had a very successful Gypsum Blitz in the [10,997] Knoxville market. Ten new customers were added to the list and a total of 96 truckloads of board were sold for delivery before the end of the year. Price cutting continues

to be prevalent throughout the region, but our volume is up since we have been meeting this competition when we find it.

We will finish November on a strong note and all indications are that December will be exceptionally good.

By Mr. MELLOTT:

Q. Mr. Dennison, is the Gypsum Blitz referred to in Georgia-Pacific Exhibit No. 61 the type of blitzes you referred to in your answer that you gave just prior to the recess?

A. Yes, it is.

Q. And is this typical of the blitzes which were held throughout the distribution system of Georgia-Pacific?

Mr. FRICANO. Objection, unless a time period is specified.

Mr. MELLOTT. I am talking about the time period from the beginning of 1968 through 1973.

The WITNESS. Yes, it is typical. It is probably a little more successful than most of them were. It is exceptionally successful, but they all brought forth the results we were after.

[10,998] By Mr. MELLOTT:

Q. You say that this one was successful. Why do you say that?

A. Well, 96 truckloads of gypsum board in the Knoxville market from about mid-November to the end of December is a tremendous amount of gypsum in that size market.

Q. And were any new customers added to the list as a result of that?

A. Yes. It shows that 10 were added, and they were the ones that we could positively identify whenever it went into a report such as this.

Q. Mr. Dennison, we have reviewed in your prior testimony the operation of the distribution centers or branches of Georgia-Pacific from the time of the acquisition of Bestwall through 1973.

Now, I would like you to tell me, how were those branches managed from the top at Georgia-Pacific?

A. Our management policies are known by the phrase, "management by exception," and the reason for this is——

Mr. FRICANO. If Your Honor please, I would respectfully object on the grounds that the time period, number one, hasn't been specified.

More importantly, as I understand the witness' testimony, he did not become manager until 1970.

The COURT. If you want to establish [10,999] how he knows it, then—

Mr. MELLOTT. If Your Honor please, I believe the question did give the time period from the date of the acquisition through 1973. This man has been branch manager, regional manager, and finally head of the distribution division, so, certainly, it seems to me that we have established the basis for his knowledge as to the operation of the distribution system.

Mr. FRICANO. Yesterday, Your Honor, he testified that he was a regional manager for the southeast region alone from 1965 through April of 1973. It was in 1970 when he became—I guess staff.

The COURT. If you want to test that on cross examination, you may do so.

Proceed.

By Mr. MELLOTT:

Q. Would you continue with your answer, Mr. Dennison?

A. Yes. We managed by a technique known as "management by exception." And this starts at the top of the corporation.

A broad policy level is laid out for each division of Georgia-Pacific. And, incidentally, I am the operating head of the division responsible for everything in a division.

I report to an executive vice president who, up through 1973, reported to either the president or the chairman [11,000] of the board.

In this management by exception, we take the broad policy lines, and then we intend to put the final authority at the field level or right down at the plant level, because that's where it is happening.

Now, the vice president of the division gives considerable authority to a regional manager as to how he organizes and operates his region. Then the regional manager gives considerable latitude to the branch managers as to how they run their branch. As a matter of fact,in my entire staff in Portland, I only have 75 people, including our accounting department, so it is necessary, under this type of operation, to have management by exception.

It is done for the express purpose of putting the authority and responsibility at the field level.

Now, we hire or train people who are competent. We give them the responsibility for moving all the products in the branch territory. That branch manager must account for his market penetration. He must account for his operations, his personnel, compliance with all of the Government regulations, and compliance with company policy. And, we give him the responsibility, then, for producing a net profit after that.

Now we, along with giving him the responsibility, we give him authority, because giving a person responsibility [11,001] without authority to go with it is a pretty poor way to do business, in our opinion. Therefore, at every level of management, we manage by exception.

If one branch is doing a fine job and his net profit at the bottom line is coming out all right, the regional manager, in his looking at those branches' results at the end of the month, passes over those who have a satisfactory bottom line performance. He goes to those who have the problem with the bottom line. Then he begins to look into and counsel with them as to why they have a problem at the bottom line. He makes suggestions to them, he tries to get them back on the right track of making money.

Now, his suggestions might take the form of new merchandising techniques. It might take the form of a suggestion that he lowers his overall inventory to get a better return on his investment. It might take the form of suggesting new marketing techniques.

If the man wants help and will take it, he would send him help from the regional office, from the new staff people he has. He'd ask another division to give him help. He would do whatever he could do to get that man back on the right track and get him with a good net profit again at the bottom line.

So, he pays attention to those who have a problem; and those who do not, he merely passes over for [11,002] that period of time.

I do my managing from Portland in the same manner I look at the branch results. I suggest to the regional manager where he may have troubles. He explains to me, then, what he is going to do about it, how he is going to look into it, and, in some cases, he would suggest to him, "Look, you don't have enough gross margin on a whole lot of products here."

The one thing that he does not do is tell that man how, when, and where to price his product. He tells him to get his margins up, if it looks like they are not high enough, or, if one line is down a little and another is up, to offset it, he passes on over that part of it.

That's what we call management by exception; and it is a technique, I might say, that has worked very well with us.

Q. Well, now, Mr. Dennison, then, during this period, May, 1965 through 1973, to what extent, if any, did top management of Georgia-Pacific participate in the day-to-day pricing decisions of the branches?

A. Top management doesn't participate at all. We do not know what that man's individual market is. It changes daily. It is up to him to price his individual line items as he sees the market and as his need for penetration is existing.

Q. And have you seen that situation continue in that [11,003] manner during the period that you were branch manager, from 1961 to 1965; the period you were regional manager, from 1965 to 1970; and the period since 1970, when you have been the head of the division?

A. It has, and it does to this day, sir.

Q. Mr. Dennison, who is Mr. Robert Pamplin?

A. He was was chairman of the board of Georgia-Pacific, and during most of the period of time you refer to, he was also president—well, for a period of that time, but he is now chairman of the board.

Q. Did Mr. Pamplin, from time to time during this period, May, 1965, through 1973 explain the company's policy of flat-out production to you?

A. Yes, he did.

[11,004] By Mr. MELLOTT:

Q. On frequent or infrequent occasions?

A. Every opportunity that he got.

Q. What did he say to you in that regard?

A. He explained to me, as well as to all other officers and regional managers in the division—and incidentally, he met at least twice a year with the regional managers and sometimes four times a year. And then he addressed all of our branch manager seminars that go out to Portland. But he makes it

clear on every occasion that is appropriate, that it is the policy of Georgia-Pacific to operate its plants flat-out without regard to seasonality of market or without regard to where it is going and then it is up to the marketing arm of the company to see that it gets sold.

Q. And would allocations be made by the plants to the various branches to sell the product in keeping with that policy?

A. The plants allocate within its area served and then it is up to the regional manager to see that those allocations are fair and equitable according to the marketplace.

Q. Did you witness these allocations take place in your region while you were regional manager?

A. I did, yes.

[11,005] Q. To what extent did Mr. Pamplin tell you to sell gypsum and other products aggressively in the marketplace and to attempt to increase the market share for those products?

A. His words were to the effect that the manufacturing plants were going to make it and it was up to the marketing, distribution arm, to sell it and he expected it to be sold.

Q. To what extent, if any, did Mr. Pamplin tell you or give you instructions you are not to deviate in prices or cut prices with reference to the sale of gypsum wallboard products?

A. He never did and I doubt he ever even knew the individual prices.

Q. To what extent did he participate in the pricing of wallboard products during the period May, 1965 through 1973?

A. To my knowledge, he never participated in the pricing end of any of the products that we sell.

Q. Now who is Mr. William Hunt?

A. He at one time was President and Executive Vice-President in my time, and Vice-President in my time, with the company.

Q. Did Mr. Hunt, from time to time, explain the company's policy of flat-out production to you?

[11,006] A. He did.

Q. Was that on frequent or infrequent occasions?

A. Frequent occasions and he urged that we get behind the program and move the product and he urged that we also make money at the bottom line.

This was his typical approach to it get the product moved and you figure out how to make the money at the bottom line.

Q. To what extent did Mr. Hunt tell you during this period May, 1965 to 1973 to sell gypsum products and other products handled by the Distribution Division aggressively in the marketplace, and to attempt to increase the market share of Georgia-Pacific for those products?

A. There were frequent lectures and admonitions and encouragements to get out and get the job done.

Q. To what extent, if any, did Mr. Hunt ever tell you or give you instructions during this period that you were not to deviate in prices or to cut prices in the sale of gypsum wallboard products?

A. He never did. He merely urged us to get the best profit we could on any and every product.

Q. To what extent did any of your superiors, including Mr. Hunt or Mr. Pamplin, ever tell you or give you any instructions you were not to deviate in prices or cut the prices in the sale of gypsum wallboard products?

[11,007] A. None of them ever did.

Again, it was only an urging to get the job done and get the product sold and have the best result we could at the bottom line.

Q. Now, Mr. Dennison, I would like to turn to the competitive conditions in the marketplace.

During the period 1968 through April of 1970, a portion of the period that you were Regional Manager in the Southeastern Region of the Distribution Division of Georgia-Pacific, what were the competitive conditions in the marketplace with reference to the sale of gypsum wallboard?

A. Was that 1968?

Q. Starting beginning in 1968, January of 1968 through April of 1970.

I picked April of 1970, because I believe that is when you became Vice-President of the Distribution Division.

A. Yes.

During that period competition was most severe. I guess I would categorize it as a price war, if I had to pick simple phrases.

Q. What different types of forms did that competition take?

A. Well, as I testified previously, we found U.S. [11,008] Gypsum out buying up hardgoods dealers or some way acquiring them or controlling them. I am not prepared to say exactly

how it was done, but that was the report that came back to us from the field.

I believe they were called L & W Supply Company.

We found Flintkote establishing some branches and I believe that National Gypsum also established some branches around the country.

I am not sure how many of them.

All of this was in response to our competition laid down. And I say it was in response, because customer after customer told us that our competition was going to do so and so, because we had this vast distribution system that was causing them no end of trouble in the marketplace.

Q. Well, what types of things were being offered to the customers by competition during this period of time in the Southeastern Region?

A. Well, it ranged all over the place. Extended terms were one. That is extended credit terms. Additional time allowed to pay for invoices were one of the main things.

We heard about the loans and that sort of thing, but we didn't chase those down to any great extent.

Of course, we had to be aware of extended terms. When someone gave those across a broad market area, or even [11,009] if they only gave them to one person, and we wanted to sell, we had to consider that as a competitive factor.

Q. To what extent did price cutting exist in that period time in the Southeastern Region?

A. We found it difficult from day to day to find any price level and we met competition where we found it, and we made competition where we weren't selling enough of our own product across the broad market.

Q. To what extent did special service enter into the competition during that period?

A. We offered special services. I think some of our competitors did, too, but we offered special services as a way to not only meet price competition, but we offered it as a way to get some of the gross margin back, because we hoped to make a profit on the special services we rendered.

And in general, we did.

Mr. MELLOTT. If Your Honor please, may I approach the witness stand?

Mr. Grainer, I would like you to furnish the witness with these exhibits, if you would, please, as a group.

This may take a few minutes, Your Honor.

I think we had them already previously selected.

Thank you.

If Your Honor please, I have placed before the [11,010] witness several Georgia-Pacific exhibits. Rather than reading the numbers of all of them, if I could give a copy of the list to the reporter and have it incorporated into the record. These documents are all in evidence. I just want this witness to identify them and then I will read from three of them.

The COURT. All right.

By. Mr. MELLOTT:

Q. Would you look at——

Mr. FRICANO. If Your Honor please, may I have a copy?

The COURT. Yes.

Be sure and give Mr Fricano a copy of that list.

Mr. MELLOTT. They have copies of all of the exhibits.

Mr. FRICANO. I don't have a copy of the list.

Mr. MELLOTT. All right.

Following is the list of exhibits provided to the witness by the clerk:

Georgia-Pacific Exhibit Nos. 294, 298, 301, 314, 449, 455, 505, 514, 517, 539, 557, 560, 562, 563, 571, 573, 582, 583, 627, 629, 630, 641, 657, 668, 677, 694, 704, 707, 722, 726, 727, 732, 744, 749, 763, 768, 769, 776, 777, 786, [11,011] 798, 804, 809, 815, 816, 817, 821, 829, 833, 845, 857, 858, 861, 865, 869, 1010, 1011, 1078 and 1079.

By Mr. MELLOTT:

Q. Mr. Dennison, would you examine the documents which have been placed in front of you and then tell me, if you would, please, what those documents are in general. I am not asking for a detail description of each document.

The COURT. Do you want him to go through every one of those?

Mr. MELLOTT. I think he can flip through them pretty quickly, Your Honor.

Mr. FRICANO. If Your Honor please, if he has seen these before and he can testify as to what they are, I will accept that.

The COURT. You tell us what they are, Mr. Mellott.

Mr. MELLOTT. May I ask it this way, Your Honor?

By Mr. MELLOTT:

Q. Mr. Dennison, you have reviewed these documents, have you not?

A. Yes, I have.

Q. Do they constitute weekly market reports for the period 1968 through 1970, either written to you, by you or with copies to you?

[11,012] A. Yes, they are.

Mr. MELLOTT. Your Honor, I would like to read from three of them.

First from Georgia-Pacific Exhibit 314.

This is a weekly market letter from D. K. MacFarland to K. A. McCaskill with a copy to Mr. Dennison, dated October 25, 1968, under the heading Market Conditions.

I am sorry. Under the heading Competitive Conditions:

> Prices continue to change from day to day. Kaiser now rumored to be protecting jobs on life-of-job basis, along with U.S.G. and National.

Under the heading Branch Activity:

> Gypsum blitz schedule for Knoxville Branch.

From Georgia-Pacific——

Mr. FRICANO. If Your Honor please, may we have the statement that appears under the heading Market Conditions read, please.

Mr. MELLOTT. Yes, I'd be glad to read that.

This is still from Georgia-Pacific Exhibit 314, Market Conditions:

> Business remains unsettled and shipments are quite a bit off standard. From all indications jobs are not ready for gypsum. I don't believe, [11,013] however we have lost position.

And then it follows the competitive condition part which I previously read.

From Georgia-Pacific Exhibit 769 dated October 3, 1969, from Mr. Dennison to Mr. Sand. Subject: Southeastern Market Week Ending October 4, 1969.

It reads, the second paragraph, and the first sentence in the last paragarph:

> It seems it is almost impossible to find the bottom of gypsum market. Competition seems to have a new lower price practically every week. October is going to be an uphill fight for both volume and profit.

Mr. FRICANO. May we have the first paragraph read, please.

Mr. MELLOTT. All right.

Still from Georgia-Pacific Exhibit 769.

> Business continued to be hard to find. Severe weather the first few days of this week caused by a tropical depression out in the Gulf seemed to be the primary cause of a further decline in business. Unfortunately, this is the second week we have had this condition.

From Georgia-Pacific Exhibit 816 dated February 20, 1970, Mr. Dennison to Mr. H. E. Sand. Subject: [11,014] Southeastern Market Week Ending February 21, 1970.

I will read the second paragraph of that letter.

> Gypsum business is harder to come by each day and prices are continuing to fall. The decline in housing starts has caused our competitors to seek business in areas where they do not concentrate. This has resulted in small lot buyers being offered the very lowest price in the market. In turn, the large volume buyers are demanding and getting a further price reduction.

[11,015] Mr. FRICANO. May we have the first paragraph, please.

Mr. MELLOTT. All right.

> Sales were reasonably good this week. Bad weather at the beginning of the week caused some decline but this was more than made up for by the surge of business from mid-week on. Prices held about where they were last week on plywood.

Mr. DELONE. Objection to the last sentence, and I ask that it be stricken. It deals with plywood, and that is not a product in this case.

By Mr. MELLOTT:

Q. Mr. Dennison, I have picked from that group of documents one in each of three years, '68, '69 and '70. From your review of those documents, are the three I have picked representative of other documents appearing in that group?

A. Yes, they are.

The COURT. I didn't rule on Mr. DeLone's objection because it appeared to me that everybody in the jury knows that we are not concerned with plywood.

By Mr. MELLOTT:

Q. Now, we have talked about the competitive conditions in 1968, 1969 and '70. How did you find the competitive condition in gypsum wallboard in the marketplace [11,016] in the years 1971, 1972 and 1973?

A. Well, it was still competitive as to getting market share and further penetration; however, in the fall—well, I think it was August 15 exactly, 1971, price controls were established on all products that we sold, and gypsum was one of them. This had the effect of putting a ceiling on the prices we could charge, but by that time housing was coming along very rapidly so that demand for the product was increasing, and I would think that demand and supply were about in balance by that time, and perhaps getting a little out of balance in that demand was greater than the supply.

So, the effect that price controls had on the market from a competitive standpoint is in my opinion that the prices would have gone much higher, and then price cutting would have set in, and they would have dropped back. However, the ceiling effectively established a floor and a ceiling because of the demand factor due to the increase in housing starts.

Q. Well, did that condition continue through 1973?

A. It did, sir.

Q. Now, from May, 1965, on when Georgia-Pacific was in the gypsum business, wasn't it the goal of Georgia-Pacific to increase its market share with reference to gypsum wallboard sales?

[11,017] A. It was indeed.

Q. And was that your goal as regional manager of the Southeastern Region during the period May '65 through April, 1970?

A. It was. Our objective was to sell out the mills that were shipping into our area as soon as we could and get them to add more production.

Q. And was it your responsibility to attempt to accomplish that goal?

A. It was.

Q. Now, from the period, April, 1970, through 1973 when you had been the head of the Distribution Division, Vice President of Georgia-Pacific, was it your goal and responsibility to increase the market share of Georgia-Pacific with reference to gypsum wallboard sales?

A. It was then—my duties were nationwide, and even in the international field, to send some across the border if necessary to keep the sales moving.

Q. Now, I would like to move to another subject at this time, the subject of credit and credit terms and credit history.

In the Southeastern Region, while you were regional manager from May, 1965, through April of 1970, were customers of the branches often invoiced for gypsum board with credit terms 2 percent 10th prox net 11th [11,018] prox with a cutoff date the last Friday of the month?

A. Yes, our standard terms out of warehouse are 2 percent 10th prox, and that is the way it is normally stated on the face of the invoice. Some of them state it a little differently, but it indicates net thereafter.

Q. Would you tell us, please, what 2 percent 10th prox means?

A. Oh, yes. First, let me get to the word "prox." It's an abbreviation for the word "proximo" which is Latin for next. So in effect it means the next month when we use it in the commercial sense.

So we are saying a 2 percent cash discount is allowed on the invoice if paid on or before the 10th day of the next month from which it was sold.

Now, our cutoff date standard was the last Friday in the month. So anything sold after the last Friday was treated as the next month.

Q. Now, these terms 2 percent 10th prox net 11th with a cutoff of the last Friday of the month, were those the same terms that were used for the products sold by the branches other than gypsum wallboard?

A. Yes. Our branches—I might say that all regions and all branches didn't use these exactly the same. For example, the West Coast—and I can't remember when they instituted it—had a one percent 10th prox policy. [11,019] I think that only applied to California and perhaps even southern California.

Q. Were there variations of credit terms used in the branches during this period from '65 through April, 1970?

A. Whenever they had to vary credit terms to meet competition, they did it. Usually, on the face of the invoice they tried to make it two 10th prox or whatever standard term they were using in that branch because we shipped other products on that same invoice, and we were always trying to pull everything back to our standard terms.

Q. Well, would you explain to us why the branch managers desired to have the terms applicable to gypsum board similar to the credit terms applicable to the other products which they were selling?

A. Well, in some cases a competitive market on terms for gypsum I think went to two 10th second prox. In other words, the second month out. So, now, when it was the second month two 10th prox, that would have left us in the position of extending those credit terms on everything that was on that invoice, if the customer had paid his invoice in full and had taken a discount on the full invoice.

And the tendency of customers is, and I can [11,020] understand it, to take the longest term they can, and the greatest discount they can on an invoice. So, in effect, they would have been discounting plywood and roofing and insulation or any other product we had on that invoice on the longer term which in effect is a form of price reduction any way you look at it. And that is the way we always treated extended terms. It is merely one way to reduce prices.

We urged the branch managers to offer instead a reduction of price representing that same amount of money that the extended term represented because finally when you get finished it is all money that you are talking about.

Q. Well, now, in those instances where a branch as part of a single order shipped gypsum and other products, wood or some other product that the branch was selling, to the same customer, would an invoice be sent to the customer listing all of the products covered by that order?

A. Yes. Some of the branches had tried to get their inside personnel always remember to break those apart. But it was rather difficult because for one thing it created a lot more paperwork flowing through the branch, and we try to keep all those things to a minimum because we try to operate at as low of a cost as we can.

[11,021] Q. So it was much easier to administer if the materials applicable to gypsum wallboard were the same as the credit terms applicable to the other products; is that correct?

A. Yes, yes, that is correct.

Q. And what were the credit terms applicable to the products being handled by the Georgia-Pacific branches just prior to the acquisition of Bestwall?

A. On out-of-warehouse sales it was two 10th prox, on some direct products, and that was almost entirely limited to plywood and lumber. It was 2 per cent 5 days after date of arrival of the car.

Q. Now, you have described the situation up to April, 1970, with reference to credit terms. Has that changed in any degree since April, 1970, through 1973, is the practice still pretty much the same?

A. Our terms?

Q. Yes.

A. Our terms are still the same. It is two 10th prox by policy. Some regions vary from it with the consent of management.

Q. During the period from May, 1965, through 1973, have the branch managers varied the credit terms from time to time by extending them?

A. Yes. The branch manager has the authority to [11,022] do this policy-wise. If somebody takes an unearned cash discount, the branch manager may allow it by merely initialing the remittance invoice where he is showing the cash discount as allowed. So effectively they can extend the term without doing anything to the face of the invoice if they merely tell the customer, "Okay, it is a competitive situation. Pay it in two months." They could initial that cash discount and allow it. They have that authority under our policy.

Now, also, we don't police when they put an invoice in. A branch may sell something on the last Wednesday in the week and invoice the customer after the last Friday which would in effect throw it over one month. He does that normally to meet a competitive condition on a particular item without getting his entire terms out of line with policy.

Q. By holding up the invoice as you have just mentioned, he in effect would permit the customer to obtain the 2 per cent discount for an additional 30 days; is that correct?

A. Yes, we used to urge him to just go along and give him the amount off the invoice, but some customers prefer to do it the cash discount route with the extended term. And we met that competition whenever we found it.

Q. To what extent, if any, did the Gypsum Division at [11,023] Georgia-Pacific during the period May, 1965, through 1973 have any control over setting the credit terms at which the Distribution Division sold gypsum or deciding whether extended terms could be offered?

A. None. Each division lays down its own credit term policy and effectively controls that. It is only in connection with the executive vice president of finance, and he has to agree to it first before its done. But in general, every divisions sets their own terms, and they are set according to the market they are in, the type of products they sell, 2 per cent 10th prox. and as I say there was some variance from that. But no other division has anything to do with our credit terms.

Q. In the general corporate credit department under the financial executive vice president?

A. The general corporate credit department is under the executive vice president of finance, but the regional credit managers answer administratively to the Distribution Division regional managers and functionally to the general credit manager in Portland who reports to the executive vice president.

Q. Mr. Dennison, we have been talking about credit terms. I would like to talk about lines of credit now. What do you understand a line of credit or an amount of credit permitted to mean?

[11,024] A. Well, in Georgia-Pacific's Distribution Division we lay down certain guidelines branches may use for their credit extension according to agency ratings. In other words, if a company is listed as triple A-1 by Dunn and Bradstreet, then there is a certain amount of credit that the branch manager automatically extends to that customer. And that is true of agency ratings for the red book which is a lumber man's book.

So we use those agency ratings and give a broad outline which applies to the Distribution Division and I think other divisions have this same broad outline. I don't know that they are the same with all divisions, but these are laid down, and it might be that under a certain agency rating the branch manager can,

without any further question, extend, let's say, $50,000 worth of credit. In other words, a person can owe us cumulatively $50,000 assuming he pays on time.

[11,025] By Mr. MELLOTT:

Q. Now, in your experience, during the period from May, 1965—and particularly after March, 1966, through 1973—to what extent, if any, have the branch managers extended credit in amounts in excess of the credit amount line authorized for the particular customer or established under normal corporate policy for a particular customer?

A. I guess the main complaint of the General Credit Department is that they exceed those lines. Branch managers do exceed credit lines. And while there is no specific authority granted, we do go along with it. But it is up to that branch manager to use the keenest of judgment. And, of course, if he loses money on the account, he is criticized for it, and it would be a judgment factor in his management ability.

Q. Mr. Dennison, have you ever attended a Gypsum Association meeting?

A. I have not.

Q. Have you ever participated in any way in Gypsum Association activities?

A. I have not.

Q. During the period May, 1965, through 1973, was it the practice of the Distribution Division personnel at Georgia-Pacific to attempt to obtain information from customers in the field as to what competitors of the [11,026] Distribution Division were doing?

A. It was. When anyone claimed to have a lower price, we asked them about it, yes. And, if we were losing business we asked the customer, "How come?" If he said, "There is a lower price in the market," then we took that into account.

Q. Was this true with respect to gypsum wallboard products?

A. It was.

Q. During the entire period?

A. It was and is today.

Q. Did you or any distribution personnel, Distribution Division personnel of Georgia-Pacific, to your knowledge, contact competitors of Georgia-Pacific at any time during this period of May, 1965, through 1973——

A. I didn't——

Q. I will finish the question—to find out what prices or terms or other competitive conditions were being offered?

A. I didn't contact them for any reason, and I specifically didn't contact them for any reason to find out prices, terms, or anything else from them.

We run our own business, and nobody else in the Distribution Division, to my knowledge, ever contacted him.

Q. Is this true also with reference to gypsum wallboard products?

[11,027] A. It is.

Q. Mr. Dennison, as a Vice President of Georgia-Pacific Corporation, I want you to tell this jury whether you ever—and I emphasize "ever"—entered into any agreement with any competitor of Georgia-Pacific to fix prices or other terms and conditions of sale of gypsum products.

A. Absolutely and positively no. Never.

* * * * *

CROSS EXAMINATION

By Mr. Fricano:

Q. Mr. Dennison, I believe you just testified that you had never contacted a competitor in order to ascertain what his price was to a customer?

A. That is correct.

Q. Does that mean, as I believe you testified, that you ran your own business, that it is unnecessary to contact competitors?

A. It means that the Distribution Division is close enough to the market that we don't feel the need in the [11,028] Distribution Division for any further information. Our branch manager decides what the competitive market is. He contacts customers, his salesmen contact customers, and they receive the information from them.

Q. Well, didn't the Bestwall Division salesmen contact customers, receive information from the customers, and prepare somewhat elaborate forms which went through several levels and back to management, in order to ascertain whether a competitive situation exists?

A. I have no personal knowledge of what the Bestwall Division did.

I can tell you this, Mr. Fricano, that, when we first started integrating the sales, we were asked to make out reports of competition. I think we did it for about two weeks. And we told them it was too complicated and too much paper. That we would ascertain what the competitive position was in the market, and that we'd tell them.

* * * * *

[11,031] Q. Well, when you asked the Gypsum Division to lower your price so that you could meet the competitive situation, did the Gypsum Division personnel—people like Mr. McCaskill, Mr. A. L. Meyer, and Mr. Sikes, who were part of the Gypsum Division, not the Distribution Division—did they take your word for it at all times? Did you know?

A. No. There were, sometimes, a little delay. There was a delay until they lost the market, until we told them it was competitive, and they didn't believe it.

* * * * *

[11,032] Q. Did each of these gentlemen—Mr. McCaskill, Mr. [11,033] Sikes, Mr. A. L. Meyer, Mr. Burch, Mr. Fatz—ever tell you that they were contacting competitors on prices?

A. They did not.

Q. And as you have testified, that's unnecessary because you run your own business?

A. I did not testify as to the necessity for the Gypsum Division to do anything. I testified, Mr. Fricano—and again I testified to the fact that the Distribution Division for its own sales feels it knows what is going on. And I still say that we feel we know what is going on to reach our decision in the field. Right or wrong we feel that we know what is going on.

Q. Who is Mr. Sand?

A. H. E. Sand is now Executive Vice-President of Georgia-Pacific, and my immediate superior.

Q. And was he a superior of yours on February 6, 1969?

A. Yes. He was.

Q. Now, if—as you have testified—you did not contact competitors regarding prices, did you have the autority at any time to contact competitors concerning prices?

A. Mr. Fricano, we have had in effect in the Distribution Division of Georgia-Pacific, ever since I have been with it, a

policy which is very simple. It says in [11,034] effect—without trying to quote it word for word—

> If you are in the company of a competitor or find yourself in any area of a competitor, and the subject of prices or anything related to it comes up, get up and remove yourself.

And we always did.

Q. All right, sir.

In that connection, bearing your testimony in mind, can you explain why on February 6, 1969, Mr. H. E. Sand, an officer of the corporation, wrote to all branch managers the following memorandum?

A recent Supreme Court decision——

Mr. MELLOTT. If Your Honor please, I object to this. Your Honor has ruled previously in this case——

The COURT. This is sustained. He can't answer why Mr. Sand did anything.

Mr. FRICANO. Well——

The COURT. I sustain the objection. You can't risk this man why somebody else did something.

Mr. FRICANO. All right.

By Mr. FRICANO:

Q. Did you receive on or about February 6, 1969, addressed to Branch Managers, the following memorandum? And, also, copies to Regional Managers.

[11,035] Mr. MELLOTT. If Your Honor please, I object to this document being read. Your Honor has ruled on this previously. It was admitted into evidence, but parts of it, with the understanding that it was not to be read.

Mr. FRICANO. Your Honor, this document I believe has been read in its entirety to the jury on at least one other occasion. He is copied on the document. He is a regional manager.

The COURT. Well, what do you want to ask him; whether he got a copy of it?

Mr. FRICANO. I want to ask him if he ever received—I want to read it to him and ask him if he received it or not.

The COURT. Let me see it.

Mr. FRICANO. It is Government Exhibit 19.

The COURT. All right.

I am going to let you read that to him. But, there is an interpretation of a Supreme Court decision in there. Whether that is what the Supreme Court said or not is not for Mr. H. E. Sand to determine, or for this witness to determine, or indeed for you to determine.

That's a matter of law for me to determine.

By Mr. FRICANO:

[11,036] Q. My question sir, is: Given your testimony that the policy of the Distribution Division was, whenever you saw a competitor, if the word "price" was mentioned to get up and leave.

Did you on or about February 6, 1969, read a document which states as follows:

> Subject: Exchange of Price Information.
>
> A recent Supreme Court decision has declared it unlawful to discuss the price of any sale of any competitor before or after the sale. This means that you should not in any way communicate with any competitor about what price he or you may have charged a customer at any time. If you wish to verify the sale of an item by a competitor to a particular customer, it will be necessary to obtain from the customer the vendor's invoice or other documentation of the sale.
>
> If you have any question about this, please contact your regional manager, Tom Withycombe, Jack Samper, or myself.

The COURT. You may answer that yes or no.

What is the date of it?

Mr. FRICANO. February 6, 1969, Your Honor.

[11,037] The WITNESS. Yes. Yes, I received it. You asked me if I received it?

By Mr. FRICANO:

Q. Yes.

A. Yes.

Q. Did you, pursuant to this letter, have any instructions issued to any of your subordinates in your region?

A. As I told you, Mr. Fricano, we had a policy, it is an overriding policy. That if price, terms and conditions of sale come

up in the presence of a competitor, get up and leave. That is the overriding stipulative policy of the Distribution Division.

No correspondence saying anything contrary-wise has ever been received by us. Indeed we still practice that. And, every now and then I renew the manual that we put out as to various sundry things.

Q. Sir, may I ask you—and I am not trying to be facetious—but would it be all right over the telephone?

The COURT. What?

By Mr. FRICANO:

Q. Would it be all right to discuss prices, terms and conditions of sale, credit matter, or any other competitive matter over the telephone?

A. Oh, come on, Mr. Fricano. Of course not.

[11,038] The COURT. What do you mean; "Would it be all right?"

Mr. FRICANO. Would it be outside of the policy is what I meant to say. Or, within the policy.

By Mr. FRICANO:

Q. Would it be within the policy or outside the policy to do it over the telephone, sir?

A. If I might categorize your question as ridiculous, it is. It is not all right to do it on the phone. And we never did, Mr. Fricano. We didn't communicate prices in any way, shape, or form to competitors, period. And we don't do this today.

* * * * *

[11,053] Q. Now, on your—you have testified, I believe, [11,054] that there was this policy of the Distribution Division, which precluded contacts with competitors concerning prices; is that correct?

A. Yes.

Q. Now, I would like for you to look at 2164, Government Exhibit 2164, and I believe——

Mr. FRICANO. This is in evidence, Your Honor.

By Mr. FRICANO:

Q. And I believe, if you will look at that, you will see that this is your Georgia-Pacific policy manual that's distributed, I believe, to officials of the corporation; is that correct?

A. It is distributed beyond that. It is distributed to the executives of the corporation; yes.

Q. And it is for 1971; is it not? It is for 1971?

A. This issue is number five, dated August, 1971; yes.

Q. All right, sir. Now, I would direct your attention to page 37 and page 38 and of this manual of Georgia-Pacific, under the heading, "Pricing Practices."

Have you got that?

A. Yes.

Q. Is the policy which you have enunciated concerning the Distribution Division contained in these two pages, with specific reference to subparagraphs 2, 3, and 4?

[11,055] A. Yes. That contans substantially the policy that was re-interpreted in the Distribution Division manual.

* * * * *

[11,057] Q. Now, if you examine 2163, which is in evidence, you will see that this again is another Georgia-Pacific policy manual, but for the year 1968.

I would direct your attention to page 32 to that portion of it which deals with pricing practices. And I would ask you. Was the policy which you enunciated with respect to contacting competitors taken from or incorporated into the language appearing there on page 32?

A. Would you repeat that for me?

Q. Sure. This is the 1968 Policy Manual, sir.

[11,058] A. Um hum.

Q. Now, I am asking you to direct your attention to page 32 under the heading "Pricing Practices."

A. Um hum.

Q. Would you tell us whether or not the language appearing there incorporates the policy concerning contacting competitors which you told us about earlier?

A. The policy used by the Distribution Division?

Q. Yes, sir.

A. Essentially, yes.

* * * * *

[11,059] Q. Now, if you will examine that document which is in evidence, Mr. Dennison, you will see that this is the 1965 Policy Manual for Georgia-Pacific.

I direct your attention specifically, sir, to pages 27 and 28 under the heading "Pricing Practices." And I will ask you sir: Is the policy which you have articulated concerning contacts with competitors articulated or set forth, or otherwise incorporated, in this document under this heading?

A. You are still asking me regarding the Distribution Division; correct?

Q. Yes, sir.

A. [Witness examining document.] It is essentially [11,060] in agreement with our policy as stated by me on several occasions this morning.

Q. And if you compare the 1965 Policy Manual to 1968, both of them have four paragraphs, and they are substantially the same; are they not?

Mr. MELLOTT. I will stipulate to that, Your Honor.

The COURT. All right.

By Mr. FRICANO:

Q. Now, you have stated, sir, in your testimony—if I recall it correctly—that this was the policy of the Distribution Division as set forth in these documents, in the Georgia-Pacific policy manuals which you have just read?

A. Yes. We had our own policy manual, I want to make that clear. And essentially it read the same way. And it was as I have stated this morning.

* * * * *

[11,072] The COURT. I think we ought to know what we are talking about. So tell us what a pink sheet is.

The WITNESS. O.K. The pink sheet represents the Distribution Division's judgment agreed to, mutually agreed to, by the Distribution Division as to what the market price is in any given area of the branch territory. It may encompass the entire branch or only be a portion of it. From that pink sheet price, which is the market price, the Distribution Division receives certain functional discounts. That is their [11,073] gross margin coming out of the Gypsum Division.

* * * * *

[11,074] Q. Well, who—you say it is mutually agreed, concerning the pink sheet price. With whom is it mutually agreed?

A. The Gypsum Division actually issues this pink sheet price, because that is their transfer price to us, is what we said the market was.

Remember, the pink sheet is the market price. We have a functional discount on that market price, like we do on many other products, because we are a wholesaler.

* * * * *

[11,075] Q. Do the branches, from time to time, sell below pink sheet prices?

A. They would sell below pink sheet prices to meet competition, or they would sell below pink sheet prices, if they were unable to put their product into the market, and then that would set the market, unquestionably, if they lowered the entire market in the branch area by selling below the pink sheet price. That would be because, in that branch manager's judgment, he had to sell below that price, in order to accomplish his volume and penetration goals.

Q. Does he then attempt to get a reduction in the price to him for the wallboard?

A. Oh, yes, because, if the market is that low, then he goes back and asks for a reissue of the pink sheet, reflecting what the market price is.

Q. Who has to have the authority? Who is the vision of Georgia-Pacific that has the authority to grant that or deny it?

A. Well, the Gypsum Division, as I said, does the issuing of the pink sheet, and it would be their agreement that the market was there, but it is rare they disagree with that, because a very simple procedure happens. If the manager is right, and if they disagreed and didn't issue a pink sheet [11,076] they wouldn't have any business in that market. National, Flintkote, all USG, somebody would have it.

* * * * *

[11,096] Q. Have you also heard of selling the wallboard to a customer and putting the list price on the wallboard, or the list price on the invoice, excuse me, and then not actually charging that invoice price but rather giving a discount from list to that customer which is either evidenced by a credit memorandum or a cashier's check?

A. Sure.

Q. Was that practice commonly in existence at Georgia-Pacific?

A. Well, it depends on what the conditions were.

Now, if I may, I will explain to you where such condition would come into place.

Let's say, for example, that we had a report that a man was buying gypsum, one man, in one branch territory. The manager had a report that he was buying gypsum at $2 under the price that we were charging. Now, if we got such a report and the manager got such a report, he would ask for some substantial proof.

Now, the customer might reply by showing him an invoice, or he might reply by saying, "I got a credit memo for damaged board which made it $2 a thousand less," or he might reply by saying, "I had some complimentary mud in the car with it." He might reply by giving us an indication that some factor was in there other than the [11,097] face of the invoice pricing.

Now, if we were to put it on the face of the invoice, customers would tell customers would tell customers. We would not then be meeting then that individual competition. So it is conceivable that the man would get a credit memo back for the credit we intend to allow him off of our regular selling price when we were meeting a competitive situation.

And as I told you, as far as we are concerned, any kind of an offer of anything is the same as money to us. So we prefer to reflect it as money. Our first preference is the face of the invoice. We would do it by a credit memo if we were meeting one single individual competitive situation.

Q. If you did it this way, and as you have testified you did from time to time, was one of the reasons for not disclosing the actual transaction price on the invoice to keep this information from spreading to other customers?

A. Well, let's put it this way. If you have one person in the market that a competitor is selling, and that may be his only customer in the market by the way, at a lower price, you want to meet that lower price there, no, you don't want necessarily to pull your whole market down by having him tell everybody and showing every gypsum salesman that comes in there. So, yes, you would use that [11,098] method.

Now, if we did find that there were four, five, ten, a spreading tendency in the market for those things to be in the market,

then, bang, we'd lower the entire market and make everybody the same price.

Q. Well, if the dealers—if one of the reasons was that you didn't want other dealers to have knowledge of this one instance where a price was dropped to a customer, did you also intend by doing this to keep this information from your competitors?

A. Oh, sure. We don't want the competitor ever to know what we are doing unless we have to let him know.

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[11,109] REDIRECT EXAMINATION

By Mr. MELLOTT:

Q. Now, Mr. Dennison, you were asked, on cross, to explain the pink sheet price that was in use by Georgia-Pacific during a portion of the period between 1965 and 1973, the end of 1973.

Now, I believe you stated that the pink sheet price was the market price, as determined in the branch area by the branch managers and their sales personnel, and that the transfer price was that pink sheet price, less a functional discount.

Do you remember that?

A. That is correct.

Q. Now, what was the actual transfer price from the Gypsum Division to the Distribution Division, during the time the pink sheet price was in effect, in terms of the pink sheet price? Do you understand my question?

A. No.

Q. Would it be the pink sheet price less the functional discounts, whatever they were?

[11,110] A. Yes. Yes.

Q. So the transfer price would be somewhat less than the pink sheet price?

A. Yes.

Q. At that time; is that correct?

A. Yes. Yes, that's correct.

Q. And the profit margin of the branch would be the difference between that pink sheet price, less the functional discounts, and whatever price the branch sold the product at; is that correct?

Mr. FRICANO. Objection to the form of the question. It is leading.

Mr. MELLOTT. Well, I realize that it is, Your Honor. Let me ask the question this way, then. I was just simply trying to expedite it.

By Mr. MELLOTT:

Q. You have testified as to the transfer price being the pink sheet price, less the functional discounts. You understand?

Now, what would the profit margin—I am not asking in terms of dollars, but just in concept. What would the profit margin of the branch be, with reference to that transfer price?

A. The cost to the branch would be pink list, less the functional discounts, and their profits would be the [11,111] difference between that cost and their selling price out of the branch, which might represent pink sheet or less, under certain conditions.

Q. So it would be—well, strike that.

Now, you have testified that the branches operated as independent profit centers, that the Gypsum Division operated as an independent profit center at Georgia-Pacific.

Now, with reference to the transfer price, as far as the Gypsum Division is concerned, how would their profit be determined with reference to that transfer price?

Mr. FRICANO. Objection. It assumes a fact not in evidence.

The COURT. What fact?

Mr. FRICANO. The fact that the witness testified that the Gypsum Bestwall Division—or the Gypsum Division operated as in independent entity. I recall no such testimony.

Mr. MELLOTT. There is testimony in the record by this witness that the Gypsum Division functioned and was looked at as an independent profit center, Your Honor.

The COURT. As what?

Mr. MELLOTT. That the Gypsum Division was looked at as an independent profit center, as well, Your Honor.

[11,112] The COURT. Yes. The trouble is with the word "entity." I don't think anybody believes it is a separate entity.

Mr. MELLOTT. Well, I will start over.

By Mr. MELLOTT:

Q. Mr. Dennison, have you testified that the Gypsum Division operated as an independent profit center at Georgia-Pacific?

A. Yes. Yes, it is a profit center.

Q. Now, during the period that the pink sheet pricing method was in effect, in which the transfer price to the Distribution Division was the pink sheet price, less the functional discount, how would the profit of the Gypsum Division be determined?

A. The money that we paid them for the gypsum would be that pink list, less the functional discounts. So their profits were affected, of course, as the market rose and fell.

Q. All right, sir. Mr. Dennison, what factors did you—by "you," I mean the Distribution Division—during the period, May, 1965, through 1973, and after—and as sales of gypsum products were integrated into the distribution system—during this period, what factors did the Distribution Division take into account in deciding when and how to meet competition in the marketplace?

Mr. FRICANO. Objection. It is beyond [11,113] the scope of the cross examination. It was covered in direct examination.

Mr. MELLOTT. If Your Honor please, I believe this is particularly relevant to some of the questioning on cross.

The COURT. Proceed.

The WITNESS. Okay. When a salesman found, in the field, that he was missing the orders or he didn't get the orders, he was told by the dealer that someone had a lower price—first, he weighed the known veracity of that customer, because he had been dealing with that customer for a long time, in most cases, selling him all sorts of products; but, then, he also asked him, whenever possible, to show him a competitor's invoice or some evidence similar to that, indicating that there was a lower price in the market.

Now, if he only achieved it with one person and only found it in one place, he met it that one place, or in the few places.

If it got numerous, then, through the branch manager, it was reported that the whole market had eroded, and he lowered the entire market to what he found that condition to be.

By Mr. MELLOTT:

Q. And what would happen if the branch manager didn't believe the particular customer?

[11,114] A. He would ask for a little more evidence. He would ask him for—to show him a competitor's invoice or some evidence that the competitor, by some method, had given

a discount, and then he would also check like factors in the market to see if they were getting a lower price, and if he found that there were some of those getting a lower price, that would pretty well confirm in his mind—and it would in mine—that there was competition in the extent that the dealer had indicated.

Q. What if he was unable to confirm it in his mind? What would he do?

A. Refuse to meet it.

Q. Now, you were asked some questions by Mr. Fricano on cross, with reference to the utilization of credit memoranda and, perhaps, certified checks, in order to cover discounts from the invoice price or the price that was shown on the invoice, with reference to the sale of gypsum products.

Do you remember that?

A. Yes.

Q. To what extent, if any, Mr. Dennison, was that practice the result of any discussion or agreement that you had with any competitor of Georgia-Pacific in the manufacture and sale of gypsum wallboard products?

A. None at all. We didn't discuss prices with competitors, and the object was to keep the competition in [11,115] the dark, as well as to keep the price erosion from spreading further.

Q. So that the utilization of the credit memoranda and the certified checks would not only prevent and perhaps aid in the customers or the other customers not finding out about the discount, it would also aid in the other competitors of Georgia-Pacific not finding out about the discount. Isn't that correct?

A. That's correct. Yes.

* * * * *

[11,139] ROBERT A. STARLING, called as a witness, and having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified on his oath as follows:

[11,140] * * * * *

DIRECT EXAMINATION

By Mr. MALLIN:

Q. State your name and address, please?

A. Robert A. Starling, 7230 West Courtenay Drive, Atlanta.

Q. By whom are you employed?

A. Georgia-Pacific Corporation.

Q. Would you give briefly your employment history with Georgia-Pacific?

A. Well, I joined Georgia-Pacific in December, 1961, and I was district hardboard manager for the Southeastern Region and I continued in that job until around November, [11,141] 1963, and I became district merchandising representative for the part of the Southeast Region and then in April of 1965 I became branch manager of the Atlanta Distribution Center.

[11,142] By Mr. MALLIN:

Q. Have you been in charge of the Atlanta branch of Georgia-Pacific from April, 1965 through the end of 1973?

A. Yes, sir, I have.

Q. Mr. Starling, in my inquiry here, I do not mean to inquire about anything after 1973. So will you understand that, even if sometimes I don't give the specific date? Can we proceed that way?

A. Yes.

Q. Could you show the jury where the Atlanta branch of Georgia-Pacific is located with reference to GP 50?

I think there is a pointer to your right.

A. We are located right there.

Q. Thank you. And with reference to the city of Atlanta, in what area, in terms of type of area, is the Atlanta branch located?

A. Well, we are located in an industrial area at 125 Ardley Drive in the city limits of Atlanta.

Q. Is the branch located near transportation arteries?

A. Yes, sir, we are about two or three blocks right off the interstate highway.

Q. Is the branch located with rail shipment facilities?

A. Yes, sir. We had rail facilities where we could unload, oh, twelve, fourteen cars.

Q. For the period May, '65, 1965, through 1973, [11,143] would you describe for the jury generally the physical facilities located at the Atlanta branch?

A. Well, we started off with approximately—at this location, with approximately 125,000 of covered areas, and we added on to the building until we had covered space of approximately 155,000 square feet.

Then we had some concrete slab area for open storage of lumber and plywood, and in addition to that, we had several acres for the storage of framing lumber that we had no shed protection on.

Q. Mr. Starling, I show you GP 14, and ask you whether you can tell us what that is?

A. Yes, I can.

Q. What is it?

A. Thats the Atlanta distribution center in Atlanta, Georgia.

Q. A photograph of it?

A. Yes, sir.

Mr. MALLIN. I offer GP 14.

Mr. THORSON. No objection.

The COURT. Admitted.

[Defendant Georgia-Pacific Exhibit No. 14 was received in evidence.]

[11,144] By Mr. MALLIN:

Q. Now, that GP 14–A is before the jury, would you generally describe what it shows with reference to the Atlanta branch of Georgia-Pacific?

A. Well, on the left-hand side of the photograph, you have the office area. It is a two-story office affair.

Q. Perhaps you could use the pointer to make it clear what you are talking about.

A. All right. Right here, and back over on this side, we have the loading areas, and, of course, the warehouse extended all the way to the back, with the railroad siding in the back, and, then, on the other side of this office, not shown, was additional warehouse space, but no loading area.

Q. Can you tell us approximately the amount of covered warehouse space that the Atlanta branch had during the period that we are discussing?

A. Well, 155,000 square feet.

Q. Did the amount of warehouse space increase or decrease or remain the same over that period?

A. Well, we started out with approximately 125,000 feet, and then we added on until we got up to around 155,000, and, then, of course the concrete slab area that was added as considered as an additional——

Q. You referred to concrete slab area. What [11,145] specifically do you mean? Is that a type of storage area?

A. Yes, sir, because right off to the side here you have got some Georgia red clay, and you can't run those forklifts out there with gypsum or lumber or plywood on there, and it is necessary to go in there and pour concrete slab area in order to operate your forklifts.

Q. So you do have a concrete slab area for the storage of products at the Atlanta branch?

A. Yes, sir.

Q. And how large is that and where is it located with reference to the photograph GP 14–A?

A. Well, it is located on the right-hand side of the end of the building there, and since that picture was taken, there have been two additions put on to the building, and, then, the concrete slab area.

Q. During the period we are discussing, did the Atlanta branch own any trucks?

A. Yes, sir, we did.

Q. Could you give us some idea of the number of trucks over the period?

A. Well, I would say just taking, say, 1968, that we had around ten, eleven trucks, and on up through 1971, we had around fourteen trucks.

Q. Were any of those trucks boom trucks?

A. Yes, sir, they were.

[11,146] Q. What is a boom truck?

A. Well, a boom truck, we call a boom truck a truck that is outfitted with an unloading rig on it that can be used for unloading either lumber, gypsum or plywood or other products.

Q. I show you GP Exhibit 12–A and ask you whether you can tell us what that is?

A. Yes, sir, I can.

Q. What is it?

A. Well, one is an International 20–10 flat truck with a Prentiss unloader boom on it, and the other is an International 4070 diesel tractor.

Mr. MALLIN. I offer Georgia-Pacific 12–A.

Mr. THORSON. No objection.

The COURT. Admitted.

[Defendant Georgia-Pacific Exhibit No. 12–A was received in evidence.]

By Mr. MALLIN:

Q. Now, that Georgia-Pacific 12–A is on the easel, would you describe for the jury what it shows?

A. Well, of course, here we have the International truck with the Prentiss unloader on it, and this particular [11,147] truck is loaded with gypsum board, and, of course, this unloader is used for job site delivery, and when the truck gets to the job site, of course, the crane comes down and picks up part of the load and facilitates putting the board into second story or first floor building, and, of course, over here we have one of the tractor-trailer rigs that we operate out of Atlanta.

Q. On the truck to the jury's left of the photograph, is that gypsum board in the apparatus above?

A. You mean up in the air?

Q. Yes.

A. Yes, sir, that's gypsum wallboard.

Q. And it is used in that manner to put the gypsum wallboard into a second story or higher level of a construction project, is that correct?

A. Yes, sir.

Q. I show you Georgia-Pacific Exhibit 15–A and ask you what it is?

A. That's a Georgia-Pacific boom truck at the job site, unloading gypsum wallboard into a second-floor unit.

Mr. MALLIN. I offer Georgia-Pacific Exhibit 15–A.

Mr. THORSON. No objection.

The COURT. Admitted.

[11,148] [Defendant Georgia-Pacific Exhibit No. 15–A was received in evidence.]

By Mr. MALLIN:

Q. Mr. Starling, now, that Georgia-Pacific Exhibit 15–A is before the jury, would you describe for them what it shows?

A. Well, of course, here you have got the truck parked in position, and which is one of the major tasks in delivering job site gypsum board, and here they have got a bundle of gypsum board, and he is positioning it over through an opening in the second floor window, and, then, they will scatter the board within the building.

Q. Were these types of job site deliveries used by the Atlanta branch during the period we are discussing?

A. Well, we started the boom truck delivery in Atlanta in 1969 and, of course, we continued it.

[11,149] By Mr. MALLIN:

Q. Continued through 1973?

A. Yes, sir.

Q. Now, coming back to a description of the nature of the Atlanta branch operation, could you tell the jury, please, approximately the number of employees at the Atlanta branch over the period that we are discussing?

A. Well, it would range anywhere from 70 to 90.

Q. Taking the 90 figure as an example, would you give us a typical breakdown of that 90 figure in terms of the types or categories of employees?

A. Well, of the 90, we would have, say, 15 inside sales—inside salesmen and outside salesmen, and part of these would be sales managers, and then we would have five secretarial and clerical, and we would have 70 that would be broken down into truck drivers, forklift operators, warehouse men, and delivery—gypsum delivery people.

Q. Now, there was some discussion, this morning, in connection with a restatement of gypsum wallboard sales figures for Georgia-Pacific.

I want to ask you this about the Atlanta branch. Did the Atlanta branch sell gypsum board before the acquisition of Bestwall Gypsum Company in May, 1965?

A. No, sir. We did not.

[11,150] Q. Now, would you tell the jury, generally, the product lines sold by the Atlanta branch over the period May, 1965, through 1973?

A. Well, we sold sanded plywood, sheathing plywood, prefinished paneling, overlaid plywood, sidings, doors, redwood lumber, hardwood lumber, some nails, and framing lumber, and, of course, moldings and various trim items, and then, later, of course, after the acquisition, of course, we had the gypsum products.

Q. Were all these products handled by the Atlanta branch produced by Georgia-Pacific?

A. No, sir, they were not, and I may not have named all of the ones that we actually handled and—because it changed from time to time.

Q. I want to be clear whether the Atlanta branch would buy some product lines from producers other than Georgia-Pacfiic and resell them in the marketplace in Atlanta.

A. Yes, sir. We did.

Q. Can—would you please tell the jury, generally, the classes of customers to whom the Atlanta branch markets products?

A. Well, we sold to retail lumber dealers, mobile home manufacturers, modular home manufacturers, hard material dealers, industrial accounts, drywall applicators, [11,151] and contractors.

Q. What do you mean by drywall applicators?

A. Well, a drywall applicator in our area would buy board or would—first, he would take a contract, either on a house or on an apartment job or commercial building, to put the drywall up and, basically, to do a complete job of furnishing the board, taping it, and finishing it.

Q. What geographic trading area did the Atlanta branch of Georgia-Pacific serve over the period May, 1965, through 1973?

A. Well, when we started in 1965, we were covering an area of approximately 300-mile radius of Atlanta, and, at the end of 1973, we were down to about a 75-mile radius of Atlanta.

Q. Could you tell us approximately what the radius was in 1968?

A. In 1968, I would say somewhere around 125-mile radius of Atlanta.

Q. So the radius of the geographic trading area served by the Atlanta branch was decreasing over the period that we have been discussing?

A. Yes, sir; it was.

Q. Well, what are the advantages or reasons for decreasing the trading area of the Atlanta branch?

[11,152] A. Well, of course, every time we opened a new branch in the area, we would open it in order to give customers better service and put the product closer to the market, and, when that happened, the Atlanta branch ended up with less trading area to serve.

Q. And what consequence did that have with respect to the Atlanta branch, in terms of its efforts to make market penetration?

A. Well, that meant we had to scratch the ground a little harder and find a little extra business and get a bigger piece of

the market, and actually take that business away from somebody else.

Q. Now, when the Atlanta branch trading area was reduced, over this period, did other branches of Georgia-Pacific take up the trading area that was taken from the Atlanta branch?

A. Yes, sir; they did.

Q. Would you tell the jury what other branches of Georgia-Pacific took over part of the trading area of the Atlanta branch, as it existed in May, 1965?

A. Augusta, Georgia; Savannah, Georgia; Albany, Georgia; Macon and Columbus, Georgia; Montgomery, Alabama; Birmingham, Alabama; Chattanooga, Tennessee; and Knoxville, Tennessee; and, when we opened Nashville, Tennessee we lost a small area that we were working up there.

[11,153] Q. Were any of these branches that took over parts of the previous Atlanta branch trading area newly opened branches of Georgia-Pacific?

A. Yes, sir. They were all brand new.

Q. All of them?

A. All of them.

Q. Now, would you refer to Georgia-Pacific Exhibit 50? I note that speaks as of January 1, 1969, so it may not have on it all of these newly opened branches that you have just described, but, to the extent that it does have them on, would you point those newly opened branches out to the jury, the branches that took over part of the original trading area of the Atlanta branch?

A. All right. We have got Augusta, Georgia. Let's see. Augusta, Georgia, and Savannah; and you have Chattanooga and Nashville, Tennessee; and this is Birmingham, Alabama; and this is Albany, Georgia; and I believe that is it—the ones with the dots, there.

Q. I take it the branch in Tampa wasn't one that took part of the Atlanta trading area.

A. No, sir, it wasnt.

Q. Now, in describing the classes of customers to whom the Atlanta branch sells products, I believe you mentioned dealers.

Would you tell us more specifically the types of [11,154] dealers to whom the Atlanta branches sold products over this period?

A. Well, the retail lumber dealer and, of course, the hard material dealer, and the drywall applicator, and the contractor,

along with the industrial accounts and the mobile home manufacturers and the modular home manufacturers.

Q. Well, focusing on the dealers, did I—pardon me. Did you refer to hard material dealers and retail lumber dealers?

A. Yes, sir.

Q. Do those dealers buy both gypsum wallboard products and non-gypsum products from the Atlanta branch?

A. The ones in our area; yes, sir.

Q. Do some of your accounts in Atlanta also buy gypsum wallboard from other gypsum wallboard producers?

A. Yes, sir. They do.

[11,155] By Mr. MALLIN:

Q. Could you give the jury the names of just several of the larger gypsum wallboard accounts in Atlanta during the period that we are discussing?

A. Loomis Supply Company, Watkins Lumber Company, and Southeastern Drywall.

Q. Did any of those accounts buy both gypsum wallboard products and non-gypsum products from the Atlanta Branch?

A. Yes, sir, they did.

Q. Did any of those accounts buy gypsum wallboard from other gypsum producers?

A. Yes, sir.

Q. Which other gypsum producers, to the extent that you know?

A. Well, they bought from National Gypsum, U.S. Gypsum, Dierks. Those I can remember. And there may have been others that they bought from.

Q. Is Dierks one of those single-plant producers?

A. As far as I know, Dierks only has one plant.

Q. Now, can you give us an approximation, over the period we are talking about, as to the annual dollar sales of the Atlanta Branch?

A. Well, in 1968 the volume for the Atlanta Branch was 15 million. And in 1973, it was 29 million.

[11,156] Q. So the sales volume of the Atlanta Branch has been increasing over that period from 1968 through 1973?

A. Yes, it has.

Q. Approximately how much of that total sales volume of the Atlanta Branch over the period was comprised of gypsum wallboard products?

A. Approximately 8 to 10 percent.

Mr. MALLIN. Your Honor, I am going on to another subject at this time.

The COURT. All right.

We will recess until tomorrow morning at 9:30.

* * * * *

[11,164] By Mr. MALLIN:

Q. Good morning, Mr. Starling.

[11,165] Yesterday you were describing the operation of the Atlanta branch of Georgia-Pacific, and I believe you testified that the Atlanta branch handled products which are not produced by Georgia-Pacific as well as products which are produced by Georgia-Pacific; is that correct?

A. Yes, sir, that is true.

Q. Now, with respect to gypsum wallboard, specifically, has the Atlanta branch handled any gypsum wallboard produced by some producer other than Georgia-Pacific?

A. No, sir, we have not.

Q. During the period that we have been discussing, May, 1965 through 1973, what other gypsum producers sold gypsum wallboard into the trading area served by the Atlanta branch of Georgia-Pacific?

A. Well, we certainly—excuse me. We certainly had USG, National Gypsum, Dierks, Celotex, Flintkote, Johns-Manville and Kaiser. Those I can remember.

Q. During that period did the Atlanta branch make sales of gypsum wallboard for direct shipment from the plant directly to the customer?

A. Yes, sir, we did.

Q. Were those direct shipments by railcar or by truck or both, or whatever?

A. Well, we had it available either for car shipment [11,166] or truck shipment.

Q. And were truck shipments available for gypsum wallboard from the plant to the Atlanta trading area all the period since May 1965?

A. Yes, sir, they were.

Q. From what gypsum plants were shipments of gypsum wallboard for the Atlanta trading area generally made?

A. From our Brunswick, Georgia, mill.

Q. Now, could you tell the jury, generally, what classes of customers bought gypsum wallboard from the Atlanta branch for direct shipment from the factory to the customer?

A. Well, we had direct shipments from the mill, of course, to the retail lumber dealer, and we had direct mill shipments on occasion to mobile home manufacturers, hard material dealers, drywall applicators, and in some cases contractors.

Q. Now, during that same period of time that we have been discussing, did the Atlanta branch make sales of gypsum wallboard out of warehouse stock of the Atlanta branch?

A. Starting in 1966, yes, sir, we did.

[11,167] By Mr. MALLIN:

Q. When I say warehouse stock, is that gypsum wallboard shipped from the factory, generally Brunswick, in the Atlanta Branch, and then forwarded there for some period of time before it is shipped to a customer?

A. Yes, sir.

Q. Now, to what class of customer did the Atlanta Branch see gypsum wallboard during the period out of warehouse stock?

A. Would you repeat that question, please, sir?

Q. Yes.

I want to know generally the classes of customers to whom the Atlanta Branch sold gypsum wallboard during the period for shipment out of the warehouse stock of the Atlanta Branch.

Have I made myself clear?

A. Yes, sir.

We made shipments to the same classes of customer that I mentioned just a minute ago, and with the addition of, say, a modular home manufacturer or component home manufacturer.

Q. What do you mean by modular home manufacturer or component home manufacturer?

A. Modular home manufacturers, in my definition, would be someone that would construct a part of a house, [11,168] usually in two sections, and then the two sections would be taken to the job site and put together.

A component home manufacturer would be one that would make wall sections, roof trusses and floor sections and send that to the job to be erected on the site.

Q. Could you give the jury an approximation over the period from 1966, when you started with warehouse stock, onward, as to the proportion of gypsum wallboard sales, measured in dollar value, you shipped directly from the plant for customers of the Atlanta Branch, as compared to shipments from warehouse stock?

A. Well, starting out in 1966, I would estimate that shipments from the plant would be 90 percent and shipments out of warehouse would be approximately 10 percent.

Q. And going forward after that, did that remain the same or change?

A. Well, I would say coming on up to 1969, 1970, in that area, shipments from the plant were 10 percent, approximately, and shipments out of our branch warehouse were 90 percent.

Q. So, approximately, the ratios had reversed over that period?

A. Yes, sir, they had.

Q. Could you give us the same estimate for the year 1968, approximately?

[11,169] A. I would say in 1968 they were probably 60 percent out of the warehouse and, say, 40 percent direct.

Q. Now would you describe for the jury some examples of the circumstances, where and why shipments of gypsum wallboard would be made out of warehouse stock?

A. Well, oftentimes a customer would need a quick truck-load and it certainly wasn't unusual for a customer to call in at 11 or 12 o'clock during the day and want a truck-load that afternoon, if he could get it, and with our warehouse facilities, in most cases we could certainly accommodate him.

Other times they would want delivery the next morning, and getting it from the mill, getting the order placed and having it shipped from the mill, this wasn't always available, but we could give him service from the warehouse, so it was really a service feature that we had.

Other times the customer would have a truck coming of lumber and plywood and he may only need one or two bundles of gypsum wallboard, and we could put this right on the same truck and give him good service, and at the same time give him a competitive price on the entire shipment.

There were other times that a customer may want a particular size or a particular thickness of board that we didn't have in stock at the mill, and, again, this was [11,170] a service feature that we had available.

Q. And were those service features relating to shipments from warehouse stock advantages that you emphasized to your customers in attempting to sell gypsum wallboard to them?

A. You bet we did.

Q. Now, would you explain to the jury the different classes and types of competitors that you were competing with with respect to direct shipment from the factory and shipments out of warehouse stock?

A. Well, of course, we were competing with all the gypsum companies on direct stock and we were competing with major hard materials dealers who were in the area, who were buying a competitor's board, and in some cases we competed with many of the dealers that we sold.

Certainly, this was the case, if we were selling to the contractor or to the applicator, and in some cases we even competed with another Georgia-Pacific branch.

[11,171] By Mr. MALLIN:

Q. Looked at from the standpoint of the dealer-customer, what are the advantages to him of being able to obtain gypsum wallboard out of your warehouse stock?

A. Well, of course, service is one big feature. The other thing is he can buy his gypsum at the same place he buys his lumber and his plywood, and he doesn't have to run all over in dividing up his business and he can just give it all to us.

And another advantage would be that we would load his truck, if he came by, and he didn't have to warehouse it or worry with carrying the dollars invested in the inventory and he came by and we would load his truck for him.

The COURT. Mr. Starling, I have the impression some of your competitors don't agree with giving all of the business to you is necessarily an advantage.

The WITNESS. No, sir, they haven't. They haven't been that charitable in Atlanta.

By Mr. MALLIN:

Q. Do some of the smaller dealers generally buy in less than truckload quantities?

A. Yes, sir. We have a lot of small dealers, in particular out in the country, that do buy less than [11,172] truckload quantities.

Q. Now if we take one of those small dealers who wants gypsum board in less than truckload quantities, what are his alternatives? What is looked at from his standpoint of getting that gypsum board available?

A. Well, of course, if he wants it tomorrow morning, he can order it from Georgia-Pacific and, or, he can order a part truckload direct from the mill from Georgia-Pacific or any of the competitors and this is a very difficult type of shipment from most people in the industry to make, because you have to go out and find somebody to take the other half of the truck or other part of the car, and other sources would be to buy from a large hard materials dealer in the area or buy from another dealer.

[11,173] By Mr. MALLIN:

Q. Would he have the alternative of buying a full truckload, even though he didn't really want it at that time, and then storing it?

A. Yes, sir. He could certainly do that.

Q. And would there be cost associated to him in taking that action?

A. Well, he might have his money tied up three, four, five months, and plus having to store the goods, too.

Q. Now, with respect to making transactions for the small dealer who wants gypsum wallboard in less than truckload quantities, with whom were you competing to get that business?

A. I am sorry. Would you repeat that question, please?

Q. Yes. We were just discussing the transactions where you were attempting to sell products to a smaller dealer who wanted less than truckload quantities. Are you with me at that point?

A. Yes, sir.

Q. Now, in attempting to get that business, who were you competing with?

A. Well, of course, we were competing with the major gypsum manufacturers, in my way of thinking, because, if that dealer went to a hard materials dealer in the area who was not buying Georgia-Pacific board and who was a strong [11,174] dealer for one of our competitors, then, USG and National Gypsum or

Dierks, whoever it might be—in a sense, that was the same as direct from the mill, and still a loss of sale, if we lost the business.

Q. Now, Mr. Starling, over this period, May, 1965, through 1973, did you attempt to keep track and abreast, from information in the marketplace, as to what your competitors were doing?

A. Yes, sir. I did.

Q. And in your contact with customers, did you attempt to find out what your competitors were doing?

A. Yes, sir. They usually let us know. We didn't have to ask them.

Q. Did customers or potential customers, from time to time, advise you as to competitive prices and other services being offered by your competitors?

A. Yes, sir. They did.

Q. Now, Mr. Starling, I would like to focus, for a moment, on the years 1968 and 1969. With reference to gypsum wallboard, what were the competitive conditions in the Atlanta trading area that you found right out in the marketplace?

A. Well, I would say, during that period of time, they were vicious and cutthroat and about as competitive as any conditions that I have seen.

[11,175] Q. Now, moving forward in time, during the period 1970 through 1973, with reference to gypsum wallboard, what were the competitive conditions that you found, right out in the marketplace, in the Atlanta trading area?

A. Well, I don't think, in 1971—I really didn't see much difference in 1971 and 1970. '72, probably, it wasn't quite as cutthroat, and the same in '73, but I can never remember selling gypsum wallboard that it wasn't a competitive situation and a highly competitive situation.

Q. Now, would you describe this competition you found in the marketplace? And you referred to it as vicious or cutthroat; would you describe to the jury a little further what you mean by that?

A. Well, of course, we like to sell a customer material and we like to feel that, when we go back two weeks later, he runs out of material, that he will call Georgia-Pacific, and we get reorder type business, but this certainly wasn't the case at that time.

It seemed like you had to resell the customer every time you went back, and it seemed like you had to resell him, and he had a brand new deal, or he had a brand new price, or he had a brand new arrangement, just about every time we went back, and the prices were moving all over the board, and you really had to stay on your toes in order to get your share of the business.

[11,176] Q. Was one of the forms of competition that you encountered in the marketplace offers of price concessions by your competitors?

A. Yes, sir.

Q. And which of your competitors offered price concessions in the marketplace?

A. Well, specifically, I know that USG, National Gypsum, Dierks, Celotex, Kaiser, Flintkote, and Johns-Manville—and, again, these are the ones that come to mind, that I know of.

Q. Now, when you met this price-cutting competition and encountered it in the marketplace, how did you go about—for Georgia-Pacific—to counter that competition?

A. Well, we certainly tried to be competitive, and, when we found ourselves in a competitive situation, meeting a competitive price, if we felt the price was there, and we felt that the man truly had the offer from a competitor, and it was in our best interests, yes, we would take the business.

Q. In connection with meeting the price competition in the marketplace, did you sometimes elect to go to the Georgia-Pacific Gypsum Division and request a lower price to the Atlanta branch from the Gypsum Division?

A. Well, of course, when we were faced with a competitive situation, with an account, and we didn't have [11,177] time to go back and report this to anybody and seek a lower price, rather than lose the business—and I would say, in most cases, we would cut the price ourselves and be under the competitor, take the order, and then we would go back and do our homework after we had the order.

We did report these, from time to time, and not in every case, back to the Gypsum Division in Portland, and—trying to get them to give us a lower price in the market and reporting that we were running into lower prices in the market, so that, in turn, they would give us a lower price, to preserve our profit.

Q. Did the Gypsum Division always give you the lower price that you requested?

A. No, sir; they did not.

Q. When the Gypsum Division did not elect to give you the lower price, did you often go forward and meet the lower price, in any event?

A. Yes, sir; we did.

Q. Can you give the jury an approximation, as to the proportion of times that the Gypsum Division would give you a lower price, as compared to the proportion of times that, even though the Gysum Division had not given you the lower price, you still made the lower offer in the marketplace?

Mr. THORSON. Objection, Your Honor, [11,178] unless it is first established how many times the request was even made. We are talking about proportions of often occurrences without any kind of figure as to how frequent they were.

By Mr. MALLIN:

Q. Mr. Starling, did you usually go back to the Gypsum Division and attempt to get a lower price to meet the lower price that you encountered in the marketplace?

Mr. THORSON. If Your Honor please, I think we are talking in such vague generalities here—I object on that grounds.

Mr. MALLIN. Your Honor, we are talking about a practice over a period of time.

The COURT. It will be overruled.

By Mr. MALLIN:

Q. Do you remember the last question, Mr. Starling?

A. Would you—do you mind repeating it?

Mr. MALLIN. I wonder if the reporter has it.

[Question read.]

[11,179] The WITNESS. Yes, sir. We usually went back to the Gypsum Divison. But, of course, I think we secured the order in most cases first, and then go back and report the competitive situation that we had encountered in the market in order to get the Gypsum Division to give us and grant us a lower price on gypsum board for the Atlanta market.

And we, just like any other customer, were trying to get a lower price so that we can make as much profit as we possibly can and get as much business as we possibly can.

By Mr. MALLIN:

Q. Now, would you give the jury an approximation of what proportion of the times the Gypsum Division granted the lower price as compared to the proportion of times that you made the lower offer in the marketplace, even though the Gypsum Division had not given you the lower price?

Mr. THORSON. If Your Honor please, could I inquire as to whether these proportions are in relation to something that the witness described as usual, or is some estimate as to number given.

The COURT. Why don't you do that on cross-examination instead of inquiring in the middle of his examination.

[11,180] Mr. THORSON. Very well, Your Honor.

By Mr. MALLIN:

Q. Mr. Starling, do you remember the question?

A. Yes. I would say it would be about half and half.

Q. Now, was there any requirement at Georgia-Pacific that you go back to the Gypsum Division to get a lower price before you at the Atlanta branch made a lower offer in the marketplace?

A. No, sir, there was not.

Q. Now, this line of inquiry you have referred, I believe, several times to your efforts to meet the competitive price in the marketplace. I want you to tell the jury what it meant to you in actual practice, what you did generally to meet a lower price actually in the marketplace.

A. I probably cut it a dollar below the lowest price in the market.

Q. So that you could get the business?

A. Yes, sir. I think that sort of assured us of being competitive if we were as much as a dollar low.

Q. Now, what pricing authority, if any, did you have with respect to gypsum wallboard products in the Atlanta trading area?

A. I had total and absolute pricing authority on gypsum wallboard products and all products that the Atlanta [11,181] distribution sold then and now.

Q. And was that true over the entire period that we have been discussing?

A. Yes, sir, it was.

Q. And did you exercise that authority with respect to gypsum wallboard products?

A. Yes, sir, I did.

Q. Was the Atlanta branch operated as a profit center?

A. Yes, sir, it was.

Q. Did your superiors at Georgia-Pacific review your individual prices on individual transactions for gypsum wallboard?

A. No, sir, they did not.

Q. Did your superiors at Georgia-Pacific review your overall performance in terms of profits made at the Atlanta branch?

A. Yes, sir, they did.

Q. Now with respect to information that you received in the marketplace about these lower prices. Did you get that information from the customers in the marketplace?

A. Yes, sir, we did.

Q. Did you have to ask for that information, or would the customer volunteer?

A. Well, you had two types. If the customer was [11,182] buying from us, and if he wanted to continue to buy from us, he would tell you what competition had offered him and force us down to a lower price.

If we were seeking business from a customer who was not friendly to Georgia-Pacific and who wasn't buying from Georgia-Pacific, then we would have to ask for a type of information and try to smoke out what kind of arrangement he had.

Q. Now, did your superiors at Georgia-Pacific know the actual transaction prices at which you were selling gypsum wallboard in the Atlanta market?

A. No, sir, they did not.

Q. During the period from late 1968 through 1970, to what extent, if any, were sales of gypsum wallboard made in the Atlanta trading area at the published list prices published by the Gypsum Division?

A. I would say very few were made at the publish. l list price.

Q. Who made the determination at the Atlanta branch as to whether or not to sell gypsum wallboard at published list prices published by the Gypsum Division?

A. That was my decision.

Q. Was the price at which the Atlanta branch bought the gypsum wallboard from the Gypsum Division established in a manner to permit the Atlanta branch to deviate from [11,183] the published list price published by the Gypsum Division?

Mr. THORSON. Objection, Your Honor. It is asking for the purpose, the purpose or reason behind the establishment of a price, which according to the witness's own testimony was established by someone in a different division.

Mr. MALLIN. Well, it is his observation of a practice tied together.

The COURT. Well, I have regularly ruled that one person can't be asked why somebody else did something. I think it was at the request of one of the Defendants.

Mr. MALLIN. Your Honor, I will rephrase it.

By Mr. MALLIN:

Q. Did you obtain prices from Gypsum Division at which the branch bought from the Gypsum Division—Let me rephrase that.

Did you obtain prices at which the branch bought from the Gypsum Division at levels that permitted the branch to deviate from the published list prices published by the Gypsum Division?

A. Yes, sir, we did.

Q. Were you ever instructed not to deviate from the published list prices published by the Gypsum Division?

[11,184] A. No, sir.

Q. Mr. Starling, were pink sheet prices issued for the Atlanta branch?

A. Yes, sir, they were.

Q. And would you tell the jury what a pink sheet price is with reference to the Atlanta branch?

The COURT. Is it any different than the one we had yesterday?

Mr. MALLIN. No, no.

[11,185] Mr. MALLIN: May the witness have GP 102 and GP 102B.

[Exhibits are handed to the witness by Mr. Grainer.]

By Mr. MALLIN:

Q. Mr. Starling, what is GP 102?

A. 102 is a chart showing the published list price for half-inch gypsum wallboard for the Atlanta market during the period of time from 1968, part of 1968, through about the middle of 1970, and it also shows a line on the chart which is the pink sheet price for half-inch gypsum wallboard for the same period of time.

Q. Mr. Starling, did you personally check the red line for the pink sheet prices shown on GP 102?

A. Yes, sir, I did.

Mr. MALLIN. May the witness have GP Exhibit 1300 through 1316 inclusive.

[Exhibits are handed to the witness by Mr. Grainer.]

By Mr. MALLIN:

Q. Now, Mr. Starling, would you review those—

The COURT. May I ask a question. Has the Government seen Georgia-Pacific Exhibit 102?

Mr. MALLIN. Yes, they are in evidence, Your Honor.

[11,186] Mr. THORSON. Yes, Your Honor, I believe that 1300 through 1316——

The COURT. I said Georgia-Pacific 102 which is this chart.

Mr. MALLIN. Yes, Your Honor, the Government has seen that.

Mr. THORSON. We have had a chance to examine that.

The COURT. Do you have any objections, Mr. Thorson?

Mr. THORSON. No, Your Honor.

The COURT. Fine. We don't have to go into background.

Mr. MALLIN. That will save time, Your Honor. I appreciate that.

I offer GP 102 and 102B and 102A.

The COURT. All right. They will be admitted.

[Defendant Georgia-Pacific Exhibits 102, 102A and 102B were received in evidence.]

By Mr. MALLIN:

Q. Mr. Starling, do you have a pointer up there?

A. Yes, sir.

[11,187] Q. Now, using the pointer where useful, and now that we have GP 102A on the easel before the jury, would you describe for the jury generally what it shows?

A. Well, this is the published list price that was put out during this period of time, the blue line, and, of course, this is the price that I guess Georgia-Pacific would like to have received for the board during that period of time.

Q. That is the blue line that you have been pointing to?

A. That is the blue line.

Q. The published list price published by the Gypsum Division.

A. Yes.

Now, the pink line is the price sheet, internal price sheet, that was put out, and this reflects our best assessment of what the competitive, the actual competitive price of half-inch gypsum wallboard was during their period of time in the Atlanta market. And, of course, this price is certainly important to us in the Distribution Division because this is the price——

Q. The red line now?

A. The red line. That is the price that we pay for the board less functional discounts, and so——

Q. What do you mean by "functional discounts"?

[11,188] A. Well, functional discounts—of course, we operate as a wholesaler, and we were entitled to a commission on the sale to cover our cost of operations. And, usually our discount from the pink sheet price was a five and five, and in some cases we even had an extra two dollars, and there have been occasions when we had another two dollars on top of that. So——

Q. You are—pardon me. Go ahead.

So our price, the competitive market price at the time, would be following the red line regardless of what the list price might show, and the price that the branch actually paid for the board would be substantially below that red line.

Q. So if we had the price that the Atlanta Branch paid for the board to the Gypsum Division, and we plotted that on GP 102–A, it would run somewhere below this red line?

A. Yes, sir, it would. It would be all the way below the red line all the way across.

The COURT. What purpose did the published list price have under your system?

The WITNESS. Your Honor, really very little for most of the time because I really don't know why it was even published because it didn't reflect the competitive market during the period of time.

[11,189] The COURT. As far as I can understand it, it didn't reflect anything, did it?

The WITNESS. No, sir, it absolutely had no meaning as far as we were concerned.

The COURT. All right.

[11,190] By Mr. MALLIN:

Q. Now, if we looked at a particular time here to illustrate how this chart GP 102–A works—would you take the period January 1, 1969.

Now, would you tell the jury what the published list price of the Gypsum Division was on January 1, 1969?

A. $47.50.

Q. Now, what was the pink sheet or market price for the Atlanta branch on January 1, 1969?

A. That price was $40.36, and, of course, we had our discounts to be taken off of the pink sheet price.

Q. So what was the difference between the published list price and the pink sheet or market price for the Atlanta branch on January 1, 1969?

A. Around $7 per thousand.

Q. Now, if we move over to May 1, 1969, what happened to the published list price in Atlanta on that date?

A. Well, the price went up to $52.50.

Q. Is that represented by this blue line up here?

A. Yes, sir.

Q. Now, what happened on that same date, May 1, 1969, to the pink sheet or market price?

A. The pink sheet price went up to $45.

Q. How much had the published list price gone up?

[11,191] A. The published list price had gone up approximately $5. Well, it had gone up $5.

Q. And how much had the pink sheet price gone up on that same date?

A. The pink sheet did not go up as much as the published list went up on that date, May 1, 1969?

Q. Then after May 1, 1969, in the period thereafter, what happened to the pink sheet price for the Atlanta branch?

A. Well, it was a short time after that that it came down.

Q. At this point?

A. Yes. And, actually, it came down lower than it had been prior to the increase.

Q. Now, during the period—I guess that is about a month hereafter, May 1, 1969, when the pink sheet was at this higher level. What would be the tendency and practice at the Atlanta branch with regard to the frequency of transactions made at that price during that short period.

A. Well, I think you would have very few sales during that shorter period of time because normally what we would do, we would bring in a lot of board into the branch when we had—when somebody said there was going [11,192] to be a price increase, we never knew whether it would stick or not, and, of course, it wasn't unusual for us to go to our accounts and secure an order for ten or twenty truckloads at the old price, and we would ship to him over the next month or two months, or something like that, and then this would give him an opportunity to buy the board at the lower price. And we would wait and see if the price did stick. So we sort of took care of customers.

[11,193] Q. Now, I would like to move on to during the year 1969, until we get to December, 1969.

Now, at that point, how did the pink sheet price in December, 1969, compare with the pink sheet price in September, 1968?

A. Well, the pink sheet price in December, 1969, was about $4 lower than it was in 1968.

Q. Now, during that same period, the published list price had two increases; is that correct?

A. Yes, sir.

Q. Notwithstanding the two increases over that same period in published list price, are you telling me that the pink sheet price went down over that same period?

A. Yes, sir, it did.

Q. Now, let's look at early January, 1970. What happened to the published list price in Atlanta at that point in time?

A. Well, they brought the published list price down.

Q. What happened to the pink sheet price right at about mid-January, 1970?

A. They increased the pink sheet price.

Q. Did they actually come together, or was there still a difference after the decrease in published list price?

A. There was still a difference.

[11,194] Q. Can you tell us approximately how much this decrease in published list price was in January, 1970?

A. Well, from the previous list price, it was $11.25.

Q. So even though the published list price had decreased at that time in an amount over $11, it was still higher than the pink sheet price in Atlanta?

A. Yes, sir.

Q. And then what happened to the pink sheet in Atlanta after that?

A. Well, it went through a short period there—it looks like less than a month that it held—and then it dropped again and continued to drop.

Q. Now, Mr. Starling, did you have authority at the Atlanta branch to sell gypsum wallboard products at a price less than the pink sheet price?

A. Certainly I did.

Q. And did you exercise that authority and, in actual practice in Atlanta, sell products at a price less than the pink sheet price?

A. Sure. We still had plenty of profit left in it.

Q. And your superiors did not know, on a transaction-by-transaction basis, whether you were selling below pink sheet or not; is that correct?

A. No, sir.

Q. No, they didn't know, or no, it is not correct? [11,195] I am sorry.

A. No, they didn't know, and no, they didn't care.

Q. Thank you.

Now, turning to a slightly different subject, Mr. Starling, in late April, 1965, when Bestwall Gypsum was acquired by Georgia-Pacific, did Bestwall Gypsum have a selling and marketing operation in Atlanta?

A. Yes, sir, they did.

Q. And did that marketing operation of the Gypsum Division continue for some period of time in Atlanta?

A. Well, it continued for a short period of time.

Q. How long did it continue?

A. Well, they started phasing it out. That was in April of 1965, and they started the transition, and, actually, it was complete with the Atlanta salesmen by midyear, mid-1966. The gypsum salesmen had been merged with the Atlanta branch salesmen and, actually, they were, at that point, working for me.

Q. At what point in time, then, were sales of gypsum wallboard in the Atlanta completely and fully integrated into the Georgia-Pacific Distribution Division at the Atlanta branch?

A. We put board in stock in April of 1966, and the last gypsum salesman to be put on our payroll was in August of 1966, and I would say, at that point, it was virtually complete.

[11,196] By Mr. Mallin:

Q. Now, I would like to turn to another subject, flatout production.

Were you aware of Georgia-Pacific's policy and practice relating to the goal of flat-out production?

A. Yes, sir, I was.

Q. When did you first hear that, Mr. Starling?

A. Shortly after I came to work for Georgia-Pacific in 1960—well, I would have heard about it in 1962.

Q. That was before Georgia-Pacific acquired Bestwall Gypsum Company?

A. Yes, sir, it was.

Q. And after the acquisition, did you understand that the policy of flat-out production applied to gypsum wallboard?

A. Yes, sir, along with any other product that we had.

Q. Now, would you tell the jury, looked at from your point of view in the Atlanta Branch, what the effects of the operation of the Atlanta Branch were, if any, of the flat-out production policy of Georgia-Pacific?

A. Well, of course, I guess the big thing we were required to sell an awful lot of it or expected to sell an awful lot of material, and since flat-out production had no regard for rainy weather and cold weather and bad [11,197] business conditions and things like this, it meant that you would get a lot more board shoved on you or a lot more plywood or anything else pushed to you, than you really needed, and so it wasn't unusual to have an awful lot of material coming and not really have the sales in order to move it out.

This creates some storage problems. It creates some sales problems.

Q. Was gypsum wallboard allocated to the Atlanta Branch?

A. Yes, sir, it was.

Q. Can you remember the first time that gypsum wallboard was allocated to the Atlanta Branch?

A. I am not sure I remember the exact first time. We had several different programs from time to time with different names on them.

Q. Well, can you remember one of the earliest, approximately?

A. Well, I would say it came shortly after 1966 and the—it wasn't too long after we had integrated the sales force there.

Q. What tendency, if any, did this practice of allocation have with respect to prices in the marketplace at the Atlanta Branch?

A. Well, I guess if anything it helped to lower the [11,198] price of the product in the market, because if we went out to sell something and we cut the price, then, of course, we wouldn't have that advantage too long and our competitors would come right along behind us and they didn't give us free rein.

Q. We have referred to allocations of gypsum wallboard. What do you mean by that?

A. Well, allocations, to me, would mean that the region would be given a certain number of carloads of materials that would have to be taken and, in turn, the region divides it up among the number of branches they have in the area and then this material, you are expected to take, and to me that is forced allocation.

Q. Did this flat-out production policy and allocation policy cause the Atlanta Branch to embark on any special promotion or blitzes, as we heard referred to with respect to moving gypsum wallboard into the marketplace?

A. Yes, it did. I don't think we ever had any blitzes in Atlanta.

Q. Would you give us some examples of the type promotion and other activities that you used to try to move your allocation of gypsum wallboard products?

A. Well, I would say the first thing we would do would be cut the price and that has been always a tried and true method that has worked for us.

[11,199] The other thing that we would do, we would—we gave away country hams down there with a truckload of gypsum and if it was around Thanksgiving or Christmas, we would give a man a turkey for every truckload he got.

If he had eight or ten employees, he would get eight or ten turkeys.

The COURT. How about pecans or peaches?

The WITNESS. The peaches, they ship them all North, Your Honor, but we do have some good pecans.

But these certainly worked for us and we had, promotions with salesmen whereby we would pay the man five or ten dollars for each truckload he sold and a man could pick up $5 in a week real quick, and that inspires our people.

We sold to the contractor. We put in boom trucks in order to deliver board to the contractors and get a bigger piece of the market, because we had all this board coming toward us and we had to do something with it. And these are some of the things that we did.

Of course, we would give the man delayed billing. We would work—we would let the man almost write his own ticket and we were very flexible.

[11,200] Mr. MALLIN. May the witness have G-P Exhibit 46, please?

Your Honor, I believe this is in evidence.

The COURT. All right.

By Mr. MALLIN:

Q. Did you receive G-P 46?

In June of 1968—

A. Yes, sir; I did.

Mr. MALLIN. With the permission of the Court, I would like to read part of this document, which is only a short document, Your Honor.

G-P 46 is dated June 26, 1968. It is addressed to Mr. Bob Starling. The subject is: "Operation 'Hot Summer'." After that, there are a number of paragraphs, one through five. I'll start with paragraph two and read as follows:

> 2. Branch to place orders no later than noon, Friday, June 28, for 20 cars into warehouse stock, designated base cars, and not less than 70 additional cars designated hot summer bonus, of which not more than 25 percent may be directs; balance for warehouse stock.
>
> Paragraph three: Specifications may be revised if necessary day before scheduled for shipment. Show equally spaced shipping dates. Mill has option, speed up or delay shipment on one day [11,201] notice to you. This is similar to choke program.
>
> Paragraph four: Incentive of $2 per thousand square feet on board machine products, except sheathing will be paid on hot summer bonus cars only provided total cars—base and bonus—are shipped before end of July. However, if mill can't ship because of extenuating circumstances, bonus cars will be honored as part of program when they can be shipped.

Five: After shipment, send debit for bonus earned to Sarah Bates, Brunswick, as you did on choke.

And then there is a final sentence, unnumbered:

As previously stated, we rely on you to exercise utmost discretion in using this incentive to secure additional business. Good luck, double exclamation points.

By Mr. MALLIN:

Q. Now——

Mr. THORSON. If Your Honor please, could I ask that Mr. Mallin also read the author of this telegram and where it was sent from?

Mr. MALLIN. It is from A. L. Meyer, dated 6/26/68.

Mr. Thorson, do you see someplace that——

[11,202] Mr. THORSON. P-O-R-T; does that stand for Portland?

By Mr. MALLIN:

Q. Was that sent from Portland?

A. Yes, sir. It was from Portland.

Q. Now, looking at G-P 46, which I have just read, there is a reference to 20 base cars, 70 additional hot summer bonus cars. That is talking about railroad cars?

A. Yes, sir, it is, big ones.

Q. That the program was attempting to move by the end of June; is that the way you understand this?

A. Well, they had to ship by the end of July, I believe.

Q. July—pardon me. Pardon me, Mr. Starling. By the end of July; and the memo is dated June 26?

A. Yes.

Q. Now, can you give the jury an approximate idea of how many thousand square feet of wallboard there is in 70 railroad cars?

A. Well, you have got 90 there; you have got 70 to go with the 20.

Q. Yes, 20 and 70; 90. Pardon me.

A. And 90 cars is a whole lot of board, and you can't store it outdoors. It's got to be put inside a building, and 90 cars is roughly four and a half million feet of [11,203] half-inch wallboard—or other items, too—but that's an awful lot of board.

Q. Now, later in this communication, there is a reference to a $2 incentive per thousand square feet of wallboard.

Was that an incentive available to pass on as a price cut to customers, in order to obtain business under this incentive program?

A. Yes, sir. Certainly.

Q. And did you use that incentive, that $2 incentive, in that way?

A. Yes, sir. If you didn't, you certainly wouldn't move the 90 cars.

Q. And did you move gypsum wallboard pursuant to this hot summer incentive program?

A. Yes, sir; we did.

Q. Mr. Starling, you have testified here, yesterday and today, about your activities in the Atlanta branch, your pricing authority, the competition you faced, the price cuts you made, your ability to offer lower price.

In light of that function that you performed, I have only one last question. I want you to tell this jury, on your oath, whether you ever—and I emphasize the "ever"—entered into an agreement with a competitor to fix the price or any other term or condition with respect to gypsum [11,204] wallboard?

A. Absolutely not.

* * * * *

[11,276] ERIC FELLINGER called as a witness, having been first duly sworn, was examined and testified as follows:

The CLERK. Will you give your name to the Court?

The WITNESS. My name is Eric Fellinger.

The COURT. Gentlemen, will you bear in mind Rule 403, as far as cumulative evidence is concerned? I don't know what the witness is going to testify to. I am merely saying I don't know that much light is generated by going—by regrinding what we have ground pretty thoroughly.

Mr. MALLIN. Yes, Your Honor, and we will try to bear that in mind.

The COURT. All right.

DIRECT EXAMINATION

By Mr. MALLIN:

Q. Would you please state your name and address?

[11,277] A. My name is Eric Fellinger. I am a resident of 7 Fleet Court, Northport, Long Island.

Q. By whom are you employed?

A. The Georgia-Pacific Corporation.

Q. Would you give us briefly your employment history with Georgia-Pacific Corporation?

A. I joined the Georgia-Pacific Corporation in 1958 as a sales trainee, as soon as I left the Third Armored Division in Germany.

I spent about a year and some months in the sales training program and became a line salesman in 1960. I maintained that position through 1965, at which time I went into a management program and became a branch manager in the Lancaster distribution center in 1966.

I remained there through 1969 and was brought back to the Long Island distribution center in 1970, and I have been there in that capacity since.

Q. Would you please point out those two branches on G-P 50? There is a pointer, there, I think.

A. Surely. This would be the Lancaster, Pennsylvania, branch, and that dot, right there, is the Long Island distribution center.

Q. Now, bearing in mind His Honor's comments, were you in the courtroom the entire time that Mr. Starling testified?

[11,278] A. Yes, sir, I was.

Q. Now, if I may ask it this way, Your Honor—did Mr. Starling's description of the nature and function of a branch operation at Georgia-Pacific generally describe the nature and function of the branch operation at the two branches at which you were branch manager?

A. Quite eloquently, yes, he did.

Q. Now, we are going to try to be as brief as we can—a couple of details.

Would you tell us, at the Long Island branch, how many trucks were operated by that branch during the period you were there?

A. When I assumed the position as branch manager in 1970, there were, I believe, four trucks operating, and we ran that up to approximately nine trucks by the end of 1973.

Q. How about the Lancaster branch, in terms of trucks?

A. Why, Lancaster, we started off with two trucks. We were a relatively small branch, and, by the time I was being transferred back, at the end of 1969, we had a new branch under construction in Lancaster. We tripled the sales, and we had run the number of trucks up to four.

Q. Did both of those branches have warehouse space?

A. Oh, yes, sir, very definitely.

Q. I show you G-P 13-A and ask you what that is.

[11,279] A. That is the distribution center in Syosset, Long Island, 175 Underhill Boulevard.

Q. That is a photograph of it?

A. That is a photograph of our present location; yes, sir.

Mr. MALLIN. I offer G-P 13-A.

Mr. FRICANO. No objection.

The COURT. It is admitted.

[Defendant Georgia-Pacific Exhibit No. 13-A for identification was received in evidence.]

By Mr. MALLIN:

Q. Now, very briefly, now that the photograph is before the jury, would you indicate what it shows?

A. Well, this is the actual storage facility of some 48,000 square feet. This is the main artery of traffic for trucks, and we see a truck, here, being loaded with building materials.

Our office facility is in this small cubicle, which extends somewhat into the building.

On this end of the building is a platform which extends the length of the facility, and that is a rail car, and we have enough room there for two more rail cars at that siding.

[11,280] This is a—as you can see, this darker section is a new section that was just added in the end of 1969, which doubled the facility.

Q. Would you tell us, generally, the classes of customers to whom these two branches sold during the time you were branch manager?

A. Well, the Lancaster branch was a different type of area than Long Island. In Lancaster, we sold primarily to lumber dealers and to industrial accounts. Not so in Lancaster—in Long Island, where we sold all of t he accounts that Mr. Starling mentioned, which would have been lumber dealers, hard

goods materials dealers, industrial accounts, contractors, applicators. I think that is pretty well the list.

Q. Do you know of Georgia-Pacific selling any gypsum wallboard before April 1965?

A. No, sir. As I mentioned, I was a line salesman, and one of the few things I can look back on in my past history as a salesman with a certain amount of joy is the fact I was the first Georgia-Pacific salesman to sell a truckload of gypsum, and that was in April, I think, of 1965.

Q. Now, with respect to the Lancaster branch, would you please describe the extent of competition that you found there with respect to the gypsum wallboard?

A. If I might—when I first came to Lancaster, it [11,281] was heavily plaster type area, and we were in the plaster business for the first two years, and plastering is something like good whisky; you get used to staying with it, and it becames a little less a price factor. In——

The COURT. You have expressed an expert opinion, but we won't ask for anything further.

Mr. MALLIN. No need for voir dire.

The WITNESS. In 1967, I received pressure from my immediate supervisor, Mr. Frank Shriker to put wallboard in, get the market involved in wallboard, so that, really, the price aspect of gypsum wallboard became more obvious, as we entered into a warehousing and distribution of gypsum wall products in 1967.

That started off relatively slowly, by the way, and we didn't run into much competition, because it was a new product, but, within about a year, we had established a hard materials dealer by the name of Otto & Hollinger in Des Moines, and supplied him with a boom truck and actually gotten into the gypsum wallboard business in a sub rosa approach, and it wasn't shortly thereafter until we started to notice the discounts that we had heard so much about, out of Philadelphia, which is our next big marketing area, started to come out into the Lancaster area, so that I would say the extent of competition became quite aggresive as the year 1968 and '69 dragged by.

[11,282] By Mr. MALLIN:

Q. Now, I would like to focus on the Long Island branch, hopefully only for a few moments. Please describe the extent of competition with respect to gypsum wallboard that you encountered during the time you were branch manager at the Long Island branch.

A. I would say it is the cheapest, meanest form of competition on the east coast.

Q. What forms did that competition for gypsum wallboard take at that branch area?

A. Would you be asking other than the obvious, price?

Q. I am asking whatever—was there price competition there?

A. Price competition, of course, is the first thing we ran into. Secondly, we ran into severe terms of sale competition, extended terms of sale; the use of monetary notes to pay invoices, liens on jobs. I would say that anything they could come up with in the way of a discount or a cut price was used.

[11,283] By Mr. MALLIN:

Q. How did you respond or react to the competition that you encountered?

A. Well, basically, the only way that I was allowed to, and the only latitude that I was given or was understood to have been given, that's to cut the price to meet it.

Q. What in practice did you do?

A. I cut the price to meet the competition.

Q. Were you required to get permission from your superiors at Georgia-Pacific to cut the price?

A. No. We were never required to do that.

Q. Can you give the jury briefly some idea of the types of services and practices that you engaged in to meet and deal with competition?

A. Well, in an effort to perform some function other than just price cutting, we started to bring in boom trucks—such as was mentioned at Atlanta—which started to job lot deliveries to construction sites. We certainly delivered less than truckload quantities. We allowed for pick-up at full truckload and less than truckload prices in the market.

We would bring in special products for the customer just to garner his business. I believe those were the main approaches that we used.

[11,284] Q. At that branch did you compete with reference to gypsum wallboard with dealers to whom you had sold the gypsum?

A. We competed with practically every level of distribution. We competed with the dealers that bought the wallboard from us when we went and sold contractors, yes, sir.

Q. Were you sometimes allocated gypsum wallboard products that y ou were required to move into the marketplace?

A. I guess it was not a funny joke, but we were forcefed materials. And, there were days that I would show up at the branch for work and there would be four truckloads parked out there, none of which I knew was coming.

Q. What steps did you take with respect to promotion and other means to move that product that was allocated to you?

A. Our first reaction, of course, would be to get a sell price from the market immediately that was somewhere between our cost and what we figured was market. We put material on trucks and we'd have our salesmen call as the truck was going out in the morning, and we knew he was gonna make seven or eight stops. He'd call the dealers along the way and tell them that there was material on there at a real fine deal, and if they'd take it off, why we'd cut a real program with them. [11,285] We even went as far as to give the truck drivers a dollar a unit if they could hock the material along the way.

The COURT. You mean the truck drivers were out trying to sell the stuff off the truck?

The WITNESS. You bet they were, sir.

By Mr. MALLIN:

Q. Did these efforts to move that allocated product have any effect on the market price of gypsum wallboard in the marketplace?

A. I would believe that is a deteriorating factor.

Q. In establishing your price, Georgia-Pacific's price on some of those efforts in that marketplace generally, who made the pricing decisions for the Long Island Branch while you were there?

A. That was my responsibility.

Q. And did you do it?

A. Oh, surely.

Q. And you could do this without seeking permission of your superiors to do it?

A. Yes, I could do that. As a matter of fact, I once complained bitterly to Mr. Schleiker . . .

Q. Who is he?

A. That would be my immediate superior. He is the Northeast Regional—the Northeast Regional Manager of [11,286] the Distribution Division.

The COURT. Now, you had two bites of that apple. Don't take a third.

Go ahead.

Mr. MALLIN. Your Honor, I wanted to find out what suggestion, if any, whatever his name made.

The COURT. That's not what I was referring to. I was referring to this problem of needing the authority from somebody on high. We have heard that so many times. We don't need to hear it again.

Mr. MALLIN. Yes, Your Honor.

By Mr. MALLIN:

Q. My question now is: You started to tell us about a conversation with one of your superiors in connection with gypsum wallboard. Would you finish that, please.

A. I called him up again and complained bitterly about the amount of gypsum we had in our warehouse, and I had run out of novel ideas to get rid of it. The only retort and only reply was, "Had I considered selling at half my cost?" Which I hadn't.

Q. Now, there is evidence in this case with respect to the published list for gypsum wallboard published by the Gypsum Division of Georgia-Pacific. Would you please tell the jury the extent to which those published price lists of the Gypsum Division were used by you as a branch [11,287] manager?

A. At some point between 1970 and 1973 I realized we were getting these things and that were getting mailed to us. I told my inside man who was handling the gypsum files just to throw them away, because they really had no relationship with our market and I didn't want to confuse our customers by sending them to them.

So, we discarded those price lists.

Q. Well, if a customer simply called you, and without mentioning price asked for a load of gypsum wallboard, at what price would he be billed for that gypsum wallboard?

A. Depending again on the—I assume that you mean mill direct shipment of wallboard via truck?

Q. Well, either way.

A. Well, depending on the man's credit and the amount of business that he has given us, we would only give him—and

we'd quote him—market price, always figuring that he had somebody else's number up his sleeve and we best come in with the right number.

So we went in with the toughest number we had available to us.

Mr. MALLIN. I hope I followed your suggestion, Your Honor, because I have just one question and I will be done.

The COURT. All right.

[11,288] By Mr. MALLIN:

Q. Would you tell this jury whether you had ever entered into an agreement with any competitor to fix the price or terms or conditions with respect to gypum wallboard?

A. Never in the nine years as branch manager, no, sir. Or before that.

* * * * *

[11,299] * * *

GILBERT M. MILLER called as a witness, and having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and tesified on his oath as follows:

DIRECT EXAMINATION

By Mr. MELLOTT:

Q. Would you state your name, please?

A. Yes. Gilbert M. Miller.

Q. Mr. Miller, what is your residence?

A. 4509 Northwest 188 Avenue, Portland, Oregon.

Q. By whom are you presently employed?

A. Georgia-Pacific Corporation.

Q. What is your position with Georgia-Pacific Corporation?

A. Assistant Controller, Finance.

Q. How long have you been with Georgia-Pacific Corporation?

A. Since August of 1972.

Q. Would you tell me briefly, tell the jury briefly, what your educational background has been?

[11,300] A. Yes.

I graduated from Oregon State University in 1965 with a Bachelor of Science in Accounting and a minor in Industrial Chemistry. I then attended the University of Oregon, receiving a Master of Business Administration in 1966, again with a major in Accounting and a minor in Finance.

Q. Would you please tell us what your employment history was from the time you received your master's degree until you went to work for Georgia-Pacific?

A. Yes. I joined the Portland office of Arthur Anderson Company and was assigned to that office until June of 1971, whereupon I was transferred to Newark, New Jersey, and was a commercial audit manager in Newark, New Jersey, until I joined Georgia-Pacific.

* * * * *

[11,323] Q. Now, Mr. Miller, I placed on the easel Georgia-Pacific Exhibit 66 and 67 and 68–AA, and 69–A, for the years 1966 through 1969. Would you explain to the jury, please, what those charts show?

A. Those charts show the month-to-month percentage of Georgia-Pacific gypsum wallboard sales on a square foot basis as a per cent of industry gypsum wallboard sales.

Q. Mr. Miller, what do those charts reflect as to whether there was any change in the market share of Georgia-Pacific on a month-to-month basis from 1966 through 1969?

A. The charts reflect changes in each of the months.

[11,324] Q. Directing your attention for a moment to the chart, Georgia-Pacific Exhibit 66–A, there was a change in market share from January, '66 to December, '66; is that correct?

A. Yes, that is correct. January, '66 was 12.5 per cent, and you can see the December of '66, the month of December, was 13.5 per cent.

Q. In between the market share had varied month-to-month; is that correct?

A. Yes, that is correct.

Q. Now, do each of the other three charts show likewise changes on a month-to-month basis?

A. Yes, they do.

Q. I notice one of the major changes is from August, 1967, to September, 1967. What is the change in percentage points of market share reflected during that month period?

A. That is approximately 4.3 percentage points.

Q. Could you tell me, please, approximately how many square feet of wallboard is represented by that difference in market share?

A. 43,000 MSF, sir.

Q. And at $40 per thousand square feet on the average, how much would that be in dollars?

A. That would be approximately a million seven hundred thousand dollars.

• • • • •

[11,330] Q. Did I ask you to prepare a chart similar to these for the year 1965?

A. Yes, you did.

Q. Why did you not prepare one for the year 1965?

A. For the year 1965 monthly statistics were not available.

Mr. MELLOTT. May the witness have, Mr. Grainer, Georgia-Pacific Exhibit 65.

By Mr. MELLOTT:

Q. Did you supervise the preparation of that exhibit, Mr. Miller?

A. Yes, I did.

Q. What was the source of your data for that exhibit?

A. The same reports on a year-to-date basis, that is for the other exhibit.

Mr. MELLOTT. I offer in evidence, Your Honor, GP Exhibit 65 and 65–A.

Mr. THORSON. Same objection as to the others, Your Honor.

The COURT. Admitted.

[Defendant Georgia-Pacific Exhibits 65 and 65–A [11,331] were received in evidence.]

By Mr. MELLOTT:

Q. Mr. Miller, would you tell the jury, please, what that chart shows?

A. Yes, this chart shows the average, that is weighted average, industry share that Georgia-Pacific enjoyed in each of the years 1965 through 1973 of gypsum wallboard sales.

Q. Now directing your attention to that chart, what is the low point in the Georgia-Pacific market share as reflected thereon?

A. It is 13.5 percent in 1965.

Q. Now I believe you just testified earlier that you were unable to prepare the monthly share for 1965, because you did not have the data available. Why were you—how were you able to obtain the yearly figure for 1965 to put on this chart?

A. I did locate in the Gypsum Division, files a report that compared the entire year 1965 with 1966, so I did have the statistics available.

Q. Since Georgia-Pacific was not in the gypsum business for the first four months of 1965, were the sales of Bestwall for those months included in arriving at that 13.5 figure for 1965?

[11,332] A. Yes, sir. The 13.5 figure represents the Georgia-Pacific average market share for the entire year 1965, whether under Bestwall or GP.

Q. Now the market share as shown on Georgia-Pacific Exhibit 65-A increased from 1965 to 1967, is that correct?

A. Yes, that is correct.

Q. Excuse me.

A. From 13.5 to 16.2.

Q. What occurred in 1967?

A. In 1967 it dropped successively from 16.2 to 15.2, and then further to 14.9 in 1969.

Q. Then what happened for the balance of the period, 1969 through 1973?

A. 1970 the market share went up 16.7 per cent, then tumbled to 14.5, 13.7 and picked up slightly to 13.8 through 1971.

[11,333] By Mr. MELLOTT:

Q. What is the figure for 1968?

A. The 1968 figure is 15.2 percent.

Q. And what is the difference in percentage points between 1965 and 1973?

A. Three tenths of a percentage point.

Q. Now, referring to exhibits from which you obtained the data for this chart, would you tell me, please, what the difference in volume of gypsum wallboard sales was for Georgia-Pacific between 1965 and 1973?

A. The amount of volume sold in 1965 was 1,030,103 MSF. It was almost double in 1973, at 1,942,736 MSF.

Q. So even though the percentage points of market share increased only .3 percent, the volume of total sales almost doubled; is that correct?

A. Yes, that is absolutely correct.

• • • • •

[11,335] Q. Mr. Miller, would you explain, generally, to the jury, what Georgia-Pacific 3–A shows?

A. Yes, sir. The first column shows the average mill net price of the Gypsum Division in each of the years '68 through '63.

Q. '73.

A. I am sorry, '73. All right. The second column shows the change in that average mill net price from the [11,336] year 1968. The third column shows the value of a dollar, stated in terms of 1968 dollars.

The fourth column, then, shows the average mill net price, stated in terms of those same 1968 dollars. And the final column shows the change in that average mill net price in terms of 1968 dollars.

Q. Now, you have referred to this as the average mill net price for what size board?

A. This is for half-inch gypsum wallboard.

Q. Per thousand square feet?

A. Per MSF; yes, sir.

Q. You referred to the fact that, in the third column, you have the dollar value stated in 1968 dollars. What did you use as the basis for that determination?

A. I used the gross national product implicit price deflator.

Q. Why did you use that particular price deflator?

A. Well, I reviewed several indexes, and, in my opinion, the GNP price deflator is the most effective to show overall effects of inflation.

Q. Who publishes that?

A. The document I obtained the GNP deflator from was the economic indicators published for the 94th Congress by the Joint Economic Committee.

Q. Why did you use the publication for April, 1975?

[11,337] A. Well, I was concerned about (a) finding all the years and (b) making sure that I had the most recent revision of the implicit price deflator. That was the one most recently available in the Carnegie Business Library.

Q. Going to the first column, what was the lowest average mill net price for the one-half-inch wallboard for Georgia-Pacific in the period 1968 through '73?

A. That was the year 1970, at a $23.25.

Q. Will you point that out to the jury?

A. Yes. It is right there.

Q. How far below the price in 1968 was that?

A. That was $7.88 below the 1968 level.

Q. Am I correct, by looking at that chart, that the price from 1968 to 1970 was a downward trend at Georgia-Pacific?

A. Yes, that is correct.

Q. And from 1970 to 1973, it started to recover?

A. Yes, it did.

Q. What is the difference betwen the price—the average mill net price for one-half-inch wallboard, on a thousand square feet basis, from 1968 to 1973?

A. The difference is 35 cents, and it is still below the 1968 level.

Q. So, in whatever the dollars applicable in each of those years, in that 6-year period, the average mill net price [11,338] for one-half-inch wallboard at Georgia-Pacific had gone down 35 cents; is that right?

A. Yes, it had.

Q. Now, in terms of the comparable dollars of 1968, how much had it gone down, over that 6-year period?

A. $6.78.

Q. And, in terms of those same 1968 dollars, how much had it gone down in the 2-year period, 1968 through 1970?

A. $10.11.

• • • • •

[11,340] Q. Mr. Miller, would you tell me, please, what Georgia-Pacific Exhibit 6–A shows?

A. Georgia-Pacific 6–A shows the adjusted Gypsum Division products, as adjusted for the—profits—excuse me—as adjusted for inflation, for each of the years, 1967 through 1973.

Q. And that shows the adjusted Gypsum Division profits [11,341] before income taxes; is that correct?

A. Yes, that is correct.

Q. And when you say they are adjusted, adjusted to what year?

A. To the 1967 dollars.

[11,342] By Mr. MELLOTT:

Q. Now, does this chart, Georgia-Pacific Exhibit 6A pretty much reflect the same trend lines as those reflected on Georgia-Pacific 3A with reference to the average mill net prices for one-half inch wallboard?

A. Yes, it does.

Q. And that is a steadily downward trend from 1967 through 1970?

A. Yes, it is.

Q. And a recovery trend from 1970 through 1973; is that correct?

A. Yes, that is correct.

• • • • •

[11,344] Q. Now, do the figures shown on Georgia-Pacific Exhibit 6A reflect any of the profit from the Distribution Division of Georgia-Pacific or any other division of Georgia-Pacific other than the Gypsum Division?

A. No, they do not.

Q. In arriving at those figures, were any deductions made for the selling or other expenses of the Distribution Division of Georgia-Pacific or any other division of Georgia-Pacific?

A. No, there were no such deductions made.

Q. Now, Mr. Miller, we had referred to the fact that in 1970 the adjusted Gypsum Division profits as shown on Exhibit GP 6A reflects a loss of one million three hundred and sixty thousand dollars for the Gypsum Division; is that correct?

A. Yes, that is correct.

Q. Have you checked the records of Georgia-Pacific [11,345] to determine whether there was a profit or loss at the Acme, Texas plant in 1970?

A. The Acme, Texas plant operated at a small profit in the year 1970.

Q. Are you talking about on a yearly basis?

A. Yes. For the entire year.

Q. So even though there was a loss overall in the Gypsum Division for 1970, am I correct that the Acme, Texas plant, serving the Texas-Oklahoma area, in that year had a profit?

A. Yes, you are correct.

Q. For each of the years 1967 through 1973 covered by this chart, Georgia-Pacific Exhibit 6A, did the Acme, Texas plant show a profit or a loss?

A. The Acme, Texas plant showed a profit in each of the years.

• • • • •

[11,354] Q. Mr. Miller, I direct your attention to Georgia-[11,355] Pacific Exhibit 99–A, and I ask you what the increase in the published list price for the Pittsburgh area for one-half inch wallboard was from September, 1968, until December of 1969?

A. The increase was from $48.50 to $57.25.

Q. And how much would that be?

A. That is approximately $8.

Q. Approximately $8 per thousand square feet?

A. Yes.

Q. Now, what happened to the pink sheet price during that same period?

A. O.K. That is a period from September 16 through December of 1969?

Q. 1969.

A. In September of '68 it is just about $45, and in December of '69 it has fallen to just under $40.

Q. So even though the published list price went up about $8 during that period, the pink sheet or market price, as Mr. Starling identified it, went down over $5 during that same period; is that correct?

A. Yes, it certainly did.

Q. Do all of the charts for the other four areas shown on the easels at that time reflect similar trends although sometimes differences in amount?

A. Yes, that is correct.

[11,356] Q. Do all of those charts for the five selected areas reflect that the pink sheet or market share price went down from September, 1968, until the middle of June, 1970?

A. Yes, I believe you meant to refer to market price, though, did you not, as opposed to market share price?

Q. I am sorry. I mean to say market price, and I apologize. What is the answer to my question?

A. Yes, that is correct.

Q. So the general trend line is down on all of these charts; is that correct?

A. Yes, it is.

Q. On the Dallas chart, of course, it is a little greater than on any of the others?

A. Yes.

Q. Now, Mr. Miller, referring to all of these charts as they now appear, is there any direct relationship reflected on these charts between the published list price and the pink sheet or market price reflected by the red line?

Mr. THORSON. Objection, Your Honor. The charts speak for themselves.

The COURT. Well, he wants to interpret them.

[11,357] Go ahead.

The WITNESS. No, there is no direct relationship.

• • • • •

Q. Now, Mr. Miller, I direct your attention to pages 10 and 11 of the supplement to Government Exhibit 5085.

A. Yes, I have it.

Q. Were you present in court yesterday when Mr. Fricano referred to that document, those pages of that document, in connection with his voir dire or cross-examination of Mr. Dennison with reference to whether gypsum sales had been made by Georgia-Pacific prior to 1965?

A. Yes, I was.

[11,358] By Mr. MELLOTT:

Q. And did you hear Mr. Dennison's examination?

A. Yes, I did.

Q. I direct your attention to the statement made on the bottom of page 11, which reads as follows:

> Restated where significant to include company whose interests have been pooled with the corporation.

Now would you tell the jury, please, what that means?

A. Well, the Bestwall Gypsum Company was acquired in a transaction referred to as a pooling of interest transaction. In that case, generally accepted accounting principles, and in the year 1965, this referred to a certain research Bulletin 48 of the American Institute of Certified Public Accountants, requires in cases where an acquisition is accounted for as a pooling of interests, and where years of financial records are presented prior to that pooling, such years must be restated on a combined basis as if the companies had been together in that prior period.

Q. So whose production of gypsum would be reflected on pages 10 and 11 of Government Exhibit 5085 for the years 1962 through 1964?

A. That would be the gypsum sales of the Bestwall Gypsum Company prior to acquisition.

[11,359] Q. So when the stipulation entered into by the parties to this case reflects no sales by Georgia-Pacific Corporation in those three years, that would be correct?

Mr. THORSON. Objection, Your Honor.

The WITNESS. Yes, it would.

Mr. THORSON. It is beyond the competence of this witness to testify as to what happened seven years prior to his joining the company.

Mr. MELLOTT. May the witness have GP Exhibit 19?

The COURT. Well now, wait a minute. There has been an objection.

Mr. MELLOTT. Oh, I am sorry. I am sorry, Your Honor.

The COURT. Well, you have heard an explanation as to what the term means, and we will limit the testimony to that.

Proceed.

The term in reference to the pool, where there has been a pooling of interests, how it has to be shown and the appropriate rule.

By Mr. MELLOTT:

Q. Do you have GP Exhibit 19?

A. Yes, I do.

Q. Would you tell us please what it is?

[11,360] A. It is the annual report of Georgia-Pacific Corporation for the year 1964.

Mr. MELLOTT: If Your Honor please, I offer in evidence GP Exhibit 19.

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[11.491] • • •

RICHARD THOMPSON, called as a witness, and having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By Mr. MONTGOMERY:

Q. Would you state your name again, please?
A. Richard Thompson.
Q. Where do you live, Mr. Thompson?
A. 1311 Brightwater Boulevard, St. Petersburg, Florida.

• • • • •

[11.506] • • •

By Mr. MCSWEENEY:

Q. Are you now retired?
A. Yes, I am.
Q. When did you retire, sir?
A. Close of business, May 31, 1974.
Q. And how old are you, Mr. Thompson?
A. Sixty-six.
Q. And what position did you hold with the Celotex Corporation just before your retirement?
A. I was Vice-President, Assistant Secretary and a Member of the Board of Directors.
Q. And do you receive a pension from the company?
A. Yes, I do.

Q. And are you presently retained to do some consulting work for Celotex?
A. Yes, I am.
Q. And do you receive compenstion for that consulting work?
A. Yes, I do.
Q. Is this case one of the matters for which you have been retained to do some consulting work?
[11.508] A. Yes, it is.

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[11.511] • • •

Q. Now, when were you first employed by Celotex?
A. December 1, 1942.
Q. And what was your first job with Celotex?
A. Well, I had been with the Government approximately nine years, and so I was employed by Celotex to assist in the interpretation and the operation of that company's business under the various governmental regulations which were then in effect, price controls, materials control, manpower control, later on salary and wage controls, all of the wartime controls which were then in effect.
Q. Now, was your employment by Celotex continuous thereafter until you retired at the end of May, 1974?
A. Except for approximately 18-months interruption when I was in the Marine Corp. during World War II.

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[11.513] • • •

Q. Well, then, from 1966 when you were elected secretary up until the time you retired, were you the head of the Celotex Law Department or Legal Department?
A. Yes, I was what we called the company lawyer. We did not formally get established for payroll and administrative purposes as a legal department until I became vice president in 1959. But from 1956 on I was the top [11.514] inside lawyer in the company, yes, sir.

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[11,516] By Mr. McSweeney:

Q. Now, from time to time after 1960, did you give—and up until December 27, 1973—did you give legal advice about compliance with the antitrust laws of the United States to personnel of Celotex?

A. Yes, I did.

Q. Did that advice concern compliance with both the Sherman Act and the Robinson-Patman Act?

A. Yes, it did.

Q. During what period of time did you advise the Celotex employes about the antitrust laws?

A. The first distinct recollection that I have of getting directly involved would be in the late 1940's when I appeared at a meeting of the sales people in Chicago. From time to time thereafter, even though I was not the top legal officer for awhile, I did make several appearances at various sales meetings to discuss legal aspects of the business with the people in attendance.

Beginning in 1956, when I was the secretary and [11,517] responsible for the legal end of the business, those occurrences were a little bit more frequent.

[11,518] By Mr. McSweeney:

Q. Well then, did you give such advice, that is about compliance with the antitrust laws, to various personnel of Celotex from the 40's sometime up until and through December of 1973?

A. Yes, sir.

Q. You mentioned you recall a program in the 40's. Was that the late 40's? What is the first one you recollect?

A. About '48 or '49.

Q. Did you appear——

A. Yes, that was a meeting of what we then called District Managers, held in Chicago, and I discussed with them for a few minutes—I had a short spot on the program.

Q. Did you discuss compliance with the Federal antitrust laws?

A. Yes, I did.

Q. Thereafter did you have at the company with some regularity meetings such as sales meetings, or other meetings, where you would have a program for their benefit, and you would be one of the speakers?

A. Yes, that is true.

Q. And you would talk about various laws and compliance with various laws, including the Federal antitrust laws?

[11,519] A. That is correct.

Q. Who were present at such meetings?

A. Well, the typical occasion would be when the Sales Department was having an annual meeting of their so-called district managers. It would be the men in charge of the twelve or fifteen district sales offices that we might have throughout the country at that time. Usually they would bring in the manager and his assistant to the headquarters, which was then in Chicago, and also in attendance would be the vice president and sales manager, general sales managers and product sales managers at the general office. So the typical group would comprise 35 to 50 people.

Q. Would that include the people such as Don Miller, the product manager for gypsum?

A. Yes.

Q. Now please tell the Court and the jury in a general way what you advised and what you said and what you discussed on these occasions of these meetings through the years through 1973?

A. Well, I——

Mr. Fricano. Objection, Your Honor, unless it is specified with what degree of regularity. The witness testified generally he did this on a regular basis. I don't have the vaguest idea of what a regular [11,520] basis is.

The Court. You will have ample opportunity to question him.

Proceed.

The Witness. May I hear that question?

[Question read.]

The Witness. Well, I developed sort of a stereotyped approach, I guess. I got reprints of the Sherman Act, the Clayton Act and the Robinson-Patman, Federal Trade Commission Act and since I was talking with salesmen and they were always talking about you had to have some tools of the trade, I would wave these books around and then I would read what I thought were the provisions of what they should be conscious of of the Sherman Act. And I would proceed from the Sherman to the

Clayton and Federal Trade Commission and Robinson-Patman Act, reading paragraphs concerning, reading excerpts and discussing what those excerpts meant, as I understood, in our business, and in their daily activity as our representatives.

Q. At these meetings did you discuss with them laws other than the antitrust laws?

A. Yes. From time to time I would discuss various other statutes, wage and hour, equal employment opportunity, and in later years OSHA, and all of the various things [11,521] that come up in connection with the operation of the business.

Q. Would your other lawyers be there, that is Mr. Adams, Mr. Gaudry, or would you talk about their roles?

A. I would also—frequently they would be there. I would also describe to the group the personnel in the Legal Department and what our various specialties, if you can call it that, were.

For example, Mr. Grace, as you mentioned, was the patent attorney. Mr. Gaudry was what we call commerce counsel. His primary responsibility was in the field of tariffs and freight rates and claims. He did a lot of work in the antitrust field.

Mr. Adams was the top lieutenant, right-hand man. Everything I did, he did, if I didn't happen to be there.

I would also describe the makeup of the department and invite them to refer their questions or problems to us, if they had any.

Q. You weren't trying to make lawyers out of these people that were salesmen?

A. I always told them I was not trying to make a lawyer out of them. That was one thing I always——

Q. Did you advise them as to the availability of you and Mr. Adams and Gaudry for them to come and consult [11,522] with?

A. I did, and I told them if we couldn't handle it, we had general counsel to whom we could refer.

Q. Did you try, as you talked to them about the antitrust laws, to relate those provisions to your business, including the gypsum wallboard business?

A. Yes, I did.

I would always, from time to time, in order to have something new to talk about, run down with them the decisions which had come out either from the Supreme Court or come

to my attention from some of the lower courts since the occasion of my last visit with them.

In other words, I would always try to include a quick thumbnail review of the facts and the holdings and the effect on us, if any, of cases that had been decided since I had previously met with the group.

Q. Could you tell us as best you can how often you would have such talks and such programs?

A. Well, with the group that I have just described, the district managers and their assistants and so forth, it would be at least once a year.

There were other meetings around the home office, or the corporate office, of sales executives stationed in the corporate office, and those might occur two, three times a year, possibly, and then from time to time, [11,523] usually on an annual basis, they would bring in the newly employed field salesmen. If a man were employed in the field territory sales job and stayed with us for a year, and indicated promise of becoming a good salesman, it was the practice of the company to bring that group—sometimes it would be a few, sometimes it might be as many as 35 or 40, depending on turnover.

They would bring in the newly employed salesmen and I had a spot on the program to discuss with the salesmen some of the things I had previously been telling these other people.

Q. Did you sometimes discuss any of your forms or procedures? We have heard about the 350 and 360's.

A. Yes, often.

Q. Now, Mr. Thompson, you knew, of course, Don Miller of Celotex, who has been referred to here at various times in the testimony.

A. Yes sir.

Q. You knew him for, I guess, many, many years?

A. From the late 50's.

Q. Late 50's.

And he is dead now?

A. Yes, he died about a year ago.

Q. Yes.

You first met him in the late 50's?

[11,524] A. Yes, he was brought in from the field as an assistant to our gypsum merchandise manager and I met him at that time.

Q. Who was that?

A. That man was Meade Morris.

Q. Meade Morris?

A. Yes.

Q. Meade Morris is not with the company?

A. He is not with the company. He retired and later died.

Q. Well, was Mr. Miller the gypsum product manager as early—in the early 60's?

A. Yes, sir.

Q. The early 60's?

A. Yes, sir, early 60's, as I recall it, until the time of his death.

Q. Other than at the sales meetings or programs which you have described, did you give Don Miller legal advice concerning compliance with the antitrust laws?

A. Yes, I did.

Q. And was that——

A. That would be——

Q. —occasionally?

A. I couldn't say on any recurring basis. There might be weeks when I would see him every day for a week [11,525] and there might be weeks when I wouldn't see him at all. It was whenever he felt he wanted to see me or when I felt I ought to see him we would get together and talk over whatever problem either of us might have.

Q. What is the first time, as you sit here now, that you can recall with some specificity advising Mr. Miller, Don Miller, about the antitrust laws?

A. Well, the first specific recollection that I have of any continued frequent contact with him was in the early 1960's in connection with the market situation in El Paso, about 1960.

Q. What was that?

A. He came to me.

Q. What was that situation? And just to move along, what was the situation and what did you tell Miller and what did Miller tell you?

A. He told me that the market conditions in El Paso had degenerated to the point where he had practically no customers and he attributed this to the fact that a new company had come into business there, Texas Gypsum Company, and to meet the competition of Texas Gypsum Company a number of the other gypsum companies had opened up warehouses.

He wanted to know if there was anything wrong with our doing the same. And I said, "No."

[11,526] And a few days, or perhaps a week or so later, he came back and said the warehouse situation had been investigated and it was not practical; that most of the available, suitable space had been taken up by somebody else; that a study by our accounting people had indicated our volume was not sufficient to justify the expense and was there any other way he could continue to compete in the El Paso market.

So I asked him what he would like to do and he said if he could give an unloading allowance, he thought he could find what it was worth to the local customers to have warehouse delivery and could meet that by giving an unloading allowance. So I told him that I knew no reason why he couldn't do that, if he gave it to all of the customers we were serving in the El Paso market. And so he instituted, as I recall it, a 25 cents per hundred-weight unloading allowance and that converts to approximately $5.00 a thousand square feet reduction in price to our customers in El Paso.

[11,527] By Mr. McSweeney:

Q. Well, now, when Mr. Miller, then, came to you and asked you this, he is not asking your permission, as what they have been calling around here a line officer, to give an unloading allowance; is he?

A. No, sir.

Q You didn't have any of that line responsibility?

A. I had no line responsibility at any time.

Q. You were a staff man, so to speak.

A. I was staff.

Q. Using the terms we have heard described.

A. That's right.

Q. And he was seeking legal advice from you; wasn't he?

A. Right.

Q. And you say he could give this unloading allowance—you were telling him he could do it, under the law; not saying, "You have got my authority to spend the Celotex money"?

A. I told him this: that, if he was satisfied, from his investigation and his contact with the customer, that approximately 25 cents per hundredweight would be the equivalent of the lower prices which were being offered to other customers in

that area, and, if he would make that allowance to all of the customers in that area that he was [11,528] going to serve that way, that it would be a legal situation under any of the Antitrust Laws that I knew anything about.

Q. By the way, where is that Hamlin, Texas, where we have the plant?

A. The Hamlin gypsum plant of Celotex is located in Fisher County, Texas, which is approximately 400 to 450 miles east of El Paso and perhaps 150 to 200 miles west of Dallas.

Q. Do you know whether Miller went ahead and authorized those unloading allowances?

A. Yes, I know he did; yes.

Q. He did. Now, were there occasions, after this advice that you gave Miller in the early '60's about the El Paso market, occasions on which you advised Mr. Miller about the Antitrust Laws and the Robinson-Patman Act?

A. Yes, sir.

Q. Well, were there many or few or——

A. Oh, several. Let's put it that way.

Q. Several?

A. Probably two or three times a month.

Q. I see. Now, please tell the Court and the jury, then, on these occasions thereafter, what advice you gave Mr. Miller about the Antitrust Laws, about compliance with the Robinson-Patman Act.

Now, you understand, we are confining ourselves to [11,529] the period prior to December 27, 1973, so, in that period, what advice on the Robinson-Patman Act and the Antitrust Laws did you give him?

A. Well, I told him that, under the Robinson-Patman Act, as I understood it, he could not discriminate in favor of a customer to the detriment of another customer, if they were competitors and if the merchandise was of like grade and quality, and that, unless he could find a good faith defense, as the Robinson Patman Act calls it, to meet the equally low price of some competing manufacturer, that he had to treat all of his customers of the same class in the same trading area the same, both as to price and service and facilities, promotional allowances, or anything else.

Q. And did you advise him with respect to the Sherman Act?

A. I told him that, with respect to the Sherman Act, he could never agree with a competitor on anything, nor even discuss terms and conditions of sale or prices with competitors.

Q. Now, did you give him advice concerning this matter which has been called, here, verification.

A. Frequently.

Q. What did you tell him about that?

A. Well, I told him that, if he were confronted by a customer with a claim of a price below our price, in that [11,530] area, to that class of trade, for gypsum wallboard, and if he was unable, in his own mind, to establish the truth or falsity of the customer's claim by invoice from competing manufacturer, examination of the customer's books, affidavit from the customer, or other evidence which satisfied him, then, he could, if he were so inclined, telephone a counterpart in the competing gypsum company to ascertain if, in fact, that company had offered that customer the price which the customer claimed was available to him.

Q. And did you tell him why he could do that; that is, the good faith meeting under the Robinson-Patman Act?

A. I told him that that was the only defense that was available to him to discriminate in price, facilities, or services between customers; unless he could establish the fact that he was meeting a competitive condition, that he had no choice but to forego the business or lower the price to everybody in the area, or lose it altogether.

Q. Did you caution him about the type of inquiry which, under the Robinson-Patman Act, he could make of a competitive manufacturer?

A. Yes, sir. I discussed that with him many times.

Q. What did you tell him in that respect?

A. I told him that he could call a competitor and say that the "XYZ Lumber Company in Paducah was advised that they have a price from you on half-inch wallboard of [11,531] such-and-such figure. Is it right or is it wrong?"

Q. Did you tell him he could accept calls from others?

A. I told him he could if he wanted to.

Q. And tell them that information?

A. As long as he confined it to answering that kind of question, I told him, it was all right.

Q. So that, now, on the one hand, you had to tell him—and did you tell him, under the Sherman Act, he couldn't get together and agree with anyone?

A. Right.

Q. In fact, you discouraged him, under what you told him, from talking to others, is that right?

A. That's right.

Q. On the other hand, you told him that he could call up and verify?

A. I tried to explain to him, many times, the difficult position that he or anybody in his capacity was put in by attempting to abide strictly to the provisions or with the provisions of those two statutes, because, in effect it is difficult to tread that narrow line between permissible, as I viewed it, and non-permissible contact, and I tried to point out to him the reason why his conversations should be so circumscribed.

Q. And those two statutes, you are referring to the Sherman Act, under which the company, Celotex, is indicted and [11,532] stands trial?

A. Right.

Q. And, on the other hand, the Robinson-Patman Act, which you were trying to help that company comply with?

A. Which is equally a Federal statute, the same as the Sherman Act; yes, sir.

[11,533] By Mr. McSweeney:

Q. Did Mr. Miller ever tell you that he called some competitor and they wouldn't answer him on price verification?

A. Yes, he did.

Q. By the way—going back. When you were there in the company talking to Miller back in the early—let's say in the early '60's—when you and Mr. Miller talked, did you have this term "verification?"

A. No, sir. We called it "checking."

Q. Checking?

And this term "verification" has grown up since?

A. I have heard a lot of that.

Q. And have you seen it in the case laws?

A. Yes, I have seen it in the case law, yes, sir.

Q. By the way, if he told you that a competitor would not answer him when he called up, what did you say to him?

A. Well, I told him that the competitor didn't need to answer him, that he had his freedom of choice just the same as Miller did, and he had no recourse. If a competitor chose not to respond, why he should hang up.

Q. What could he do then about meeting the competitive price?

A. Well, then he had two choices. He could meet it and hope that the information that he already had was [11,534] sufficient and represented the true facts; or, he could give up the business of that particular account on that particular occasion.

Q. He always had available the lowering of price to everybody in the trade area?

A. He could always lower the price to everybody in the areas, certainly.

Q. Did you give the advice or the same type of advice you gave to Don Miller to other people in Celotex?

A. Yes, I did. To each of our product managers.

Q. Your job as a lawyer—you weren't just advising Miller on gypsum?

A. No, sir, I was not.

Mr. Fricano. Objection to going into any other products aside from gypsum wallboard.

The Court. Overruled.

By Mr. McSweeney:

Q. You had to give the company's legal advice to the product managers of other products; did you not?

A. Correct. Yes, sir.

Q. And you didn't, in that respect about complying with the Robinson-Patman Act in good faith meeting of competition, you didn't tell Miller one thing and the other people another thing; did you?

A. No, sir, I did not.

[11,535] Q. You gave that, generally speaking, the same advice to all the product managers?

A. Correct.

Q. Now what advice, if any, about compliance with the Robinson-Patman Act and the Sherman Act did you give to the general credit manager from this period? Let's take from late '65 through 1973.

A. Well, I gave him practically the same advice that I had given to Miller. Of course, the credit man's sphere of interest is slightly different.

They were well aware of the practice in the industry of exchange of so-called ledger information, highest amount owed, length of time to pay, and whether you had to sue to collect, and whether you had to put a lien on the job to get your money, and so on and so forth.

But, the most frequent inquiry from the credit people would be with respect to an alleged claim of extended terms within which to take a discount or a greater discount.

And in those instances I told the credit manager that terms and conditions of sale, in my opinion, were a part of price, and that I gave him the same advice that I gave Miller or the other product managers with respect to the narrow limits within which I thought it was permissible for them to make inquiries of competing companies with [11,536] respect to extended terms or greater discounts.

Q. Now, was there a difference in the legal advice which you gave the salesmen and district office men on the one hand, and a product manager like Miller—Well, say specifically Miller, on the other hand—with respect to the compliance with the Sherman Act and the Federal Antitrust Laws?

A. Yes, sir.

Q. What was that difference?

A. I never discussed with the salesmen in the field, nor with the district branch manager, this thing that I previously referred to as this narrow exception, the so-called verification procedure.

My advice to them always was to have no contacts with competitors of any kind under any circumstances.

Q. Now, why did you make that distinction between what you covered and said with the product managers like Miller on the one hand, and the advice to the salesmen in the field and district officers on the other hand?

A. Well, there are several reasons.

The salesmen in the field, or the district managers in the field, had no authority at any time to change or alter or modify any of our published terms and conditions of sale.

Secondly, there were 12 or 15 managers in the [11,537] field, and possibly 150 to 200 salesmen. It was utterly impossible for

me to have the same degree of frequent contact and the same opportunity to counsel and discuss and advise that I had with the half a dozen or so people around the home office with whom I was in daily or weekly contact, because we shared the same offices.

And, I could keep them more currently and more carefully informed than I could ever try to do the same with a big sales force.

Q. In other words if you talked about verification with them, were you concerned about suggesting to them that they would go right ahead and call up competitors willy-nilly?

A. I was concerned that that might occur to some of them to do it, and I didn't want them to do that under any circumstances.

Q. Whereas, you were confident that with men like Don Miller you could give him the right advice as to how to do it and he would do it under controlled circumstances?

A. I had an opportunity to tell him what I thought was proper or improper, and I could tell him that whenever it occurred to me or to him.

And frequently we would discuss the subject, yes.

Q. You knew Miller for how many years?

A. Well, the late '50's until he died in '74.

[11,538] Q. When you gave him this advice, did he appear to you to be a person attentive to and receptive to the legal advice you gave him?

A. He was an extremely attentive audience. He was most concerned to do nothing wrong. And he would come to me sometimes with questions that I was confident he didn't need to ask, but I never discouraged him and I'd give him the best answer I could and as much time as I could find, because Miller was a very conscientious man.

Q. Now, Mr. Thompson, we had reference here to a Supreme Court case referred to as the Container Case.

Are you familiar with that case?

A. Yes, sir.

Q. And when did you first become familiar with it?

A. The first notice I had of it was when I read in either the U.S. Law Week or the C. C. H. Trade Regulations Service—and I don't recall which one, because we subscribed to both of

them. I read the report of the case in the district court of North Carolina, I believe it was.

Q. And then did you follow it through the courts?

A. I followed it from then on through the Supreme Court.

Q. And then it went to the Supreme Court and a decision was rendered; is that correct?

A. Yes, sir.

[11,539] Q. When did you learn about the Supreme Court decision?

A. Well, the decision was rendered, I think, on January 14, 1969, and I read it January 15th in the Wall Street Journal.

About a week later I got a copy of the opinion through our regular services.

Q. You subscribed to an antitrust service which reports cases?

A. Oh, yes. We had Practicing Law Institute, BNA, and CCH.

Q. The "CCH," that's the——

A. Commerce Clearing House Trade Regulations Service.

Q. And they report——

A. They report the text of opinions, yes, sir.

Q. And the Supreme Court and other courts; don't they?

A. Yes, sir.

Q. Now, going to this Container Case.

Would you say you studied that pretty carefully?

A. I have never studied any case any more thoroughly than I have the Container Case.

Q. All right.

Now, after you studied it and considered this—I am talking about the opinion of the Supreme Court.

[11,540] A. Yes, sir.

Q. In that Container Case, what advice, if any, did you give to Mr. Miller concerning that Container Case?

A. I finally got my mind made up to the point where I told him that I didn't believe the facts of Container were identical and not very similar to the facts of the checking system that we had.

And, that I didn't believe that the Container Case forbade the practice in which he had been engaging, and I could see no particular reason why he shouldn't continue, so long as he confined himself to this narrow type of question and answer,

that there was no reason that he shouldn't continue the practice if he wanted to.

Q. In other words, you told him that there was no reason from the Container Case that he had to stop verifying with competitors?

A. That's what I told him.

Q. And did you give that advice to the product managers?

A. To the other product managers in the home office, yes.

Q. In other words, this wasn't any special advice for Mr. Miller in gypsum wallboard?

A. No, it was not.

Q. And after Container, did you follow through your [11,541] CCH Trade Regulations, and other sources, the various opinions of the Courts construing Container?

A. Yes, I did. And I was pleased to see that such cases as came to my attention the judges had taken the same attitude I did with respect to the applicability of Container to the verification process.

[11,542] By Mr. McSweeney:

Q. Did you so advise Mr. Miller and others?

A. I so advised Mr. Miller, yes, sir.

• • • • •

[11,556] By Mr. McSweeney:

Q. Mr. Thompson, this is, is it not, a form you used [11,557] or tried to use to get the customers to certify information so he could get an exception from your terms and conditions of sale?

A. That is what the 156 is, yes, sir.

Q. Had you tried this with other forms?

A. We had tried before this form was adopted to get the customer to execute an affidavit relating the details of the competitive offer which he was reporting and we found a great reluctance on the part of the customer to sign affidavits, so we devised the form which didn't require an oath.

Mr. McSweeney. Your Honor, I propose to read a portion of this exhibit, namely the first page, if I may.

Ladies and gentlemen of the jury, it is dated May 11, 1964, Bulletin No. 132. Subject: Certification of Customer's Request for Exceptions to Price or Terms of Sale.

It is again addressed to the various district managers and then to several other people all listed here and it shows a copy to Mr. Thompson.

It says as follows:

> It is imperative that competitors' prices or terms of sale which are offered to our customers be verified beyond all reasonable doubt before the [11,558] Celotex Corporation may make an exception to its published prices or terms of sale to meet that competition.
>
> Attached you will find a new form 156 on which a customer may formally state the exceptions to Celotex prices or policy being given or offered to him by competitors of Celotex. In instances where copies of invoices, written quotations or other acceptable forms of evidence of price or policy exceptions are not obtainable—

and the not is underlined——

> the salesman should have the customer verify the exceptions by completing and signing this new form. The salesman must also sign the form.
>
> Only the original of this form 156 is to accompany the form 350 or 360 when it is submitted. It will serve as confidential legal evidence that the requested Celotex price or policy adjustment is justified. Extra copies of form 156 are not required unless desired for district records.
>
> The original signed form 156 will be attached to the order department files for retention for the life of that file.
>
> Two pads each containing 25 form 156's are being sent each district manager to be used as he [11,559] determines most advantageous. Additional pads may be ordered from Chicago on a stationery requisition in the normal manner.
>
> C. F. Buckland, General Merchandise Manager.

And to it is attached the form for the certification of customer's request for exceptions to price or terms of sale.

[11,560] By Mr. McSweeney:

Q. Now, Mr. Thompson, what experience did you have with this form which you were using, now, 156, that you know of?

A. Well, basically, we had two types of experience. We had a type of customer who would sign anything if he thought it would help him to get a better price; and we had the type of customer who would not sign anything under any circumstances. So we found this form not as useful as we had hoped it might be.

Q. Previously, when you had asked them to sign an affidavit, did you find that was——

A. Almost invariably, they would refuse.

Q. This is what you were advised by your merchandise manager?

A. By the sales people in the field; yes.

Q. And this was in the gypsum wallboard area?

A. Gypsum and, also, the other product lines.

* * * * *

[11,571] Mr. McSweeney: May we please have Government Exhibit 31, in evidence.

The Witness. I have it.

By Mr. McSweeney:

Q. That is an exhibit identified and offered and received in evidence, identified and offered by the Government, identified by a prior witness.

I believe the Government asked Mr. Marshall Goddard about it when he was on the stand, Mr. Thompson.

Well, it is in evidence and I will tell the jury what it is. It is a memorandum from W. D. Herbert to Marshall Goddard, with copies to Marvin Greenwood, M. L. Courington, and Richard Thompson, dated April 12, 1968.

It pertains to teletype 350 forms. It has attached to it some proposed instructions as to what is to be put on this teletype 350 form.

[11,572] That is, what the person out in the field should put on it when he sends it into the headquarters.

Now, are you familiar with that document, Mr. Thompson?

A. Yes, I am.

Q. All right.

On this second page, which is the proposed form or the proposal as to the information which is to be put on the teletype

and sent into the headquarters, there are some strike-outs and a little bit of handwriting.

Do you know who did that?

A. I did.

Q. You did.

Now, the memorandum on the first page is dated April 12, 1968.

Did you do it on or about, or a little bit after that date, as you recall?

A. It would have been after April 12 and prior to May 1st, 1968.

Q. I see.

Now the first strike-out—and I think Mr. Fricano asked Mr. Goddard about these when he was here. He was subpoenaed and testified in the Government's case, you may recall.

A. I remember.

[11,573] Q. The first strike-out there is in paragraph numbered "2"; is it not.

A. Yes, sir.

Q. You struck that out.

What words were there? Can you make out what you struck out?

A. Yes. I struck out the two words "Misclassified Wholesaler."

Q. And why did you strike that out?

A. I will be glad to tell you. It will take just a minute or two.

Q. Well, I asked the question, so go ahead.

A. This form, as we have explained, applied to all product lines that Celotex offered, not limited to gypsum.

Our principal product line always has been insulating fiberboard. In the early years we had two types of customers for insulating fiberboard.

We really had three. But, we had a jobber, and then we had a fellow who performed a combination service, part jobber, part dealer, or part wholesaler, part dealer.

We offered our insulation board for sale under a discount arrangement whereby the wholesaler received what we called a functional service compensation or, in effect, a discount off the dealer price for performing the wholesale function. That is, buying the board from us and [11,574] re-selling it to retailers.

The man who was partially engaged as a wholesaler and partially as a dealer, we tried to limit that wholesaler functional service compensation to that portion of his business only which he did, in fact, resell at wholesale to a dealer, and not that portion of his purchases from us which he disposed of to the contractor or the customer as a dealer rather than as a wholesaler.

There grew up a tendency on the part of the customers to claim to be wholesaling more materials than we in fact knew they were, and we developed for a few years a sort of a jargon of the misclassified wholesaler. And eventually—this must have been the late '50's, early '60's—our sales group went through the whole thing and we abolished this A and B jobber, as we had called them. And we had either a dealer or a wholesaler.

And so this word, these two words, "Misclassified Wholesaler," was a holdover from a condition which had previously existed, which had been corrected, and which never related to gypsum because we never had a wholesaler in gypsum products. So I thought it had no place in the form.

[11,575] By Mr. McSweeney:

Q. All right. By the way, this form, do you know, was that—that is the part you are talking about now—was that, as far as you know, was that done, made up or written by Mr. Herbert, or do you know?

A. I assume it was. It is attached to his memorandum.

Q. It is on his memorandum.

All right. Now, then coming down on the page in paragraph numbered 9, there are some strikeouts, and I think one handwritten word there. Can you just tell us, if you can make it out, what you struck out there?

A. I struck out the parenthetical portion which says, "For example, by phone from competitor's office, competitor's salesman, etc.," and then I struck out the next word "if."

Q. Then you wrote "if" in someplace else?

A. I wrote the "if" in later on in the middle of that sentence rather than at the beginning of it, yes, sir.

Q. So could you just read it. How would it have been if you didn't strike it out?

A. The original language was this: "What proof or justification do you have to support this information. (Name person who furnished competitive information to us and how he re-

ceived it) (for example, by phone from a competitor's office, competitor's salesman, and so forth). If [11,576] name of competitor's representative not available what is reason for believing information reported. (State whether you are forwarding Form 156.)"

Q. Then how did it read after you struck it out, how did it then read?

A. As I struck it out it reads this way:

> What proof or justification do you have to support this information. (Name person who furnished competitive information to us and how he received it.) Name of competitor's representative if available what is reason for believing information reported. (State whether you are forwarding Form 156.)

Q. Now, will you tell the Court and the jury why you struck that out and why you made that change?

A. I didn't want anything to go out to our two or three hundred salesmen and our fifteen or twenty district managers to even suggest telephone contact with a competitor. And these forms were made up in the field originally by the field salesmen, and then sent into the district office for typing and submission to the home office. I thought if we sent along an example or an instruction which contained the words "phone from competitor's office," somebody might read that, "phone to competitor's office," or something, and I didn't want any phone contacts being made in the field by any Celotex salesmen.

[11,577] Q. Now, did you then discuss it with Mr. Herbert?

A. Some months later.

Q. What did he say to you and what did you say to him about it?

A. He said, "That isn't what I had in mind." And I said, "Well, Bill, I didn't ask you. I just didn't want it in. What do you have in mind?" He said, "It is an old salesman's trick. A salesman goes to the customer's office and the customer says, "I have got a better price. And the salesman says, "I don't believe it." He says, "I will prove it." So the salesman gets on an extension phone and the customer calls the competitor salesman and gets a quote. And that is what Mr. Herbert meant. But I didn't know it at the time, and he certainly didn't spell it out in very much detail, so I just struck the language out of the form.

Q. Did he accept that?

A. Yes, oh, sure.

Q. By the way, that salesman's trick you mentioned—

Mr. McSweeney. If the Court please, I have an exhibit in evidence from one of these boxes of U.S. Gypsum, 200-66. I have asked Mr. Hiering to find it for me. He can't find the one in the box, but he assures me that this is a copy of it. Just so that the jury will understand that this is a salesman's trick, here is one [11,578] of their green sheets as an example.

The Court. Do you want to read it? Is that what you want to do?

Mr. McSweeney. Just this little part, yes, to show realistically this occurred.

The Court. O.K.

Mr. Fricano. I don't have a copy of it.

The Court. Show Mr. Fricano.

Mr. McSweeney. You can read over my shoulder.

Mr. Fricano. No, thank you.

The Court. You are going to have to get him reading glasses.

Mr. Fricano. I am sorry. My eyes have gone bananas.

The Court. Let Mr. Thorson see if he can read it.

Mr. Fricano. Can you read this?

[Mr. Thorson looks at the exhibit.]

The Court. All right. Now, do you have any objection to Mr. McSweeney reading that aside from whether or not that is a copy of what is in the box, because Mr. Hiering says so, and I am satisfied that it is.

[11,579] Mr. Fricano. If he can read it, I guess he can read it with the admonitory instruction, of course, that this is hearsay and—

The Court. It is not being used to prove anything except to describe that "salesman's trick."

Mr. McSweeney. This is from one of these—they call them green sheets, U. S. Gypsum.

Mr. Fricano. May I inquire if he couldn't find this one, that in these 93 boxes aren't there a lot of them?

The Court. I don't know.

Mr. McSweeney. I didn't search all the boxes.

The Court. We are not going to search through all those boxes to find them.

Mr. McSweeney. It might have been put in the wrong box.

> Mr. L. Browner, manager of Brookville, placed a phone call to Mr. L. D. Bryant, representative of Celotex Corporation. I listened to their conversation on an extension phone and heard Mr. Bryant quote prices shown below and also heard him state they would extend the price increase date until everyone announced their plans for increases.

[11,580] By Mr. McSweeney:

Q. Is that an example, apparently, of what Mr. Herbert was talking about?

A. That is an example of the practice that Mr. Herbert described to me which he said he had in mind when he wrote this particular draft of the instructions.

Q. Now, that form we have just been talking about, that teletype form, and the one where you struck out the language on that, Government Exhibit 31, that was a form that was used by the company for all its products, was it not?

A. Yes, sir.

Q. Mr. Thompson, with respect to published price lists and the price bulletins of Celotex, particularly the published price list bulletins, did you have anything to do with them in your job there?

A. It was part of our routine, and I did have something to do with it. But that whenever a new price list was in the process of preparation, it would be routed through three or four different individuals or departments. The Legal Department was regularly on that route slip. Usually we were the last, and I would ordinarily, if I were in the office, review it and initial it; or, if I was not in the office, either Mr. Adams or Mr. Gaudry would do it for me before the list was sent to the printer for publication.

Q. And you reviewed it for what purpose?

[11,581] A. I reviewed it to see if it was generally in accordance with what I thought such a document should say.

Q. You didn't have any pricing authority, did you?

A. I absolutely had no pricing authority.

Q. Would you look at Defendant Celotex Exhibit 19.

A. Yes, I have it.

Q. What is that, sir?

A. This is a bulletin dated August 18, 1965, from Don Miller to the district sales offices of Celotex, with copies to various individuals including myself.

Mr. McSweeney. Your Honor, I offer Defendant Celotex Exhibit 19.

Mr. Fricano. No objection.

The Court. Admitted.

[Defendant Celotex Exhibit No. 19 was received in evidence.]

By Mr. McSweeney:

Q. Did you discuss this subject of this Exhibit 19 with Mr. Miller?

A. Yes, I did, before it was issued.

Q. Before it was issued?

A. Yes, sir.

Q. Yes.

[11,582] What did you say to Miller, and what did he say to you about it?

A. Well, at this time in 1965 we had only been in the Tampa office about six weeks, having moved down there on the first of July. We always, in Celotex, printed our own price lists. The equipment and the personnel for printing our price lists did not make the move from Chicago to Tampa, but we did operate those facilities for several months after the move until we could establish a new setup in Tampa for printing that type of an internal document. So it was our practice at this time to have a price list prepared and approved in Tampa, sent to Chicago for printing, returned to Tampa for mailing. And that necessarily resulted in considerable delay.

So Mr. Miller came to me at this time in August of 1965, and his problem, as he described it, was that gypsum prices were changing so fast that before he could get a new price list to Chicago and print it and back to Tampa for mailing, it was already obsolete because somebody else had moved in a different direction from which we had thought the market was going. And he wanted to know, his specific question was, whether or not we were legally required to issue published price lists for gypsum products the way we had always done, and I told him I

didn't know of any such legal requirements. I didn't think we had to [11,583] have a published price list if we didn't want to.

Q. And did he tell you what he was proposing to do then?

A. He said that generally speaking it was his experience and his knowledge, based on his experience, that the U.S. Gypsum price at any given time in any given market was pretty apt to be the going price in that market. And he wanted to know of me if he could authorize our sales people to sell at U.S. Gypsum's prices. And I said, "Certainly."

Q. And then, as far as you know, he published this?

A. Then he published this document which instructed our sales people accordingly.

[11,584] Mr. McSweeney. With the Court's permission, I would like to read this to the jury.

This document, ladies and gentlemen of the jury, is dated August 18, 1965. Subject, Gypsum Pricing. Again, it is addressed to the district managers and a certain group shown under it. It says:

> In spite of all our efforts to do so, it has become physically impossible for this office to keep the districts and our salesmen promptly informed by means of our goldenrod price bulletins, of all the recent changes which have been made in prices of various gypsum products by the leading competitive gypsum manufacturers.
>
> The trend toward establishment of delivered zone prices and the expansion of the list of products to which such delivered prices are applicable, has resulted, as you know, in a tremendous volume of detailed revisions of all our heretofore existing price schedules.
>
> Inasmuch as our regular facilities for printing and mailing are still in Chicago, the mere loss of time in transmitting mail has frequently resulted in enough delay to cause us to lose business and to defeat in a large measure the main object of our present gypsum price policy, which is to be competitive—

and to [11,585] be competitive is underlined—

> with the major gypsum companies.
>
> This, therefore, is to inform you of an important and basic change—and that is underlined—

> in the mechanics of our handling of gypsum price changes. The change is effective immediately and will remain in effect until specifically cancelled or amended by a subsequent bulletin.
>
> Under this new system:
>
> 1. The latest published price list of the United States Gypsum Company will determine the prices at which we will sell our comparable products in the areas affected.
>
> 2. It shall be the duty of each district office to transmit to this office immediately—

that is underlined—

> any new United States Gypsum Company price list, as distributed by that company to its customers, as soon as such lists comes into your possession.
>
> 3. Likewise, it will be the policy of this office to transmit immediately—and that is underlined—
>
> to any district affected, all new U.S.G. price lists which we may receive.
>
> 4. District offices shall be responsible for [11,586] informing their respective salesmen of the applicable prices in the specific areas covered by each of our salesmen.
>
> 5. Any request for deviation from the latest U.S.G. published price list for any customer or any product must be supported either by a form 350 or 360, depending upon the circumstances of each case.
>
> 6. Situations which may arise which in the judgement of the district management cannot adequately be met by the form 350 or 360 must be taken up specifically with this department.
>
> 7. Until the current situation is clarified, no effort will be made to continue our previous full coverage of gypsum prices by means of the goldenrod bulletin.
>
> Attached you will find a few examples of procedure for determining prices on plaster, lath and wallboard products which is typical for several districts.
>
> D. W. Miller, Gypsum Merchandising Department.

By Mr. McSweeney:

Q. Now, I ask you to look at Defendant Celotex Exhibit 20.

A. Yes, sir.

Q. What is that, sir?

[11,587] A. That is a bulletin from me dated November 11, 1965, addressed to the district sales offices and the subject is gypsum pricing. Carbon copies are shown to various people in the central corporate offices.

Q. It has an attachment of a magazine?

A. There is an attachment to the bulletin, a reprint from a magazine called Purchasing Week.

Mr. McSweeney. I offer Defendant Celotex Exhibit 20.

Mr. Fricano. No objection.

The Court. It is admitted.

[Defendant Celotex Exhibit No. 20 was received in evidence.]

By Mr. McSweeney:

Q. Now, Mr. Thomson, did you discuss this subject, that is the subject of this memo, with anyone?

A. Yes, I discussed it with Mr. Miller and Marvin Greenwood, the Vice-President in charge of Sales.

Q. What did you say to them and what did they say to you about it?

A. I told them since the issuance of the previous bulletin, Exhibit 19 that we just discussed, there had been brought to my attention an article in Purchasing Week [11,588] which I discussed with them, and which in my mind tended to raise some shadow of a doubt as to the propriety of the advice which the previous exhibit contained, and I thought it only fair to the company and to the people involved that we bring this possible problem to the attention of everybody concerned.

I suggested that they issue a bulletin to supplement or clarify the Miller bulletin which we have just read.

Q. It was issued under your name?

A. Well, Mr.—

Q. How did that happen that you issued it?

A. Mr. Greenwood, the Vice-President in charge of Sales, said he was in thorough agreement with the idea; he didn't know how to say it; would I write it, and since it was a legal matter, would I sign it and I said I would be glad to.

Mr. Miller concurred in it. We talked it over. So I wrote the bulletin and showed it to them and they agreed that this is

what we should say and the bulletin went out in the present form.

Mr. McSweeney. Your Honor——

The Witness. It is the only bulletin I sent to the sales department, as I recall.

Mr. McSweeney. Your Honor, the second [11,589] page is in for a limited purpose, not for the truth of the matter contained therein, as it is just a magazine article, but merely to show that it came to Mr. Thompson's attention and the reason for the issuance of this first page of the Celotex Exhibit 20, which is the bulletin, and I would like to read only the first page, if I may, to the jury.

The Court. All right.

Mr. Fricano. I would like to have the second page read too, Your Honor.

The Court. The magazine article?

Mr. Fricano. Yes, sir.

The Court. You can read it after Mr. McSweeney finishes. Why can't we let the jury look at it and read it to themselves?

Mr. Fricano. It is a brief one and I think I can read it to them.

The Court. All right. You can read it to them.

Mr. McSweeney. I believe, Your Honor, the limited nature of that offer will limit the second page.

The bulletin of Mr. Thompson, ladies and gentlemen of the jury, is as follows:

It is dated November 11, 1965, following about a little less than three months after the one I just read [11,590] you, 19, and he says——

It is again directed to the district managers and some other people, but apparently not all the assistant managers.

He says as follows:

> On August 18, 1965, Mr. Miller issued bulletin 157 on the subject of gypsum pricing, wherein you were informed of a temporary but important change in our pricing of gypsum products. Subsequently there has come to my attention an article which appeared in the publication Purchasing Week, issue of August 9, 1965, copy of which is attached hereto. Although this article must have appeared before Mr. Miller's bulletin was issued, we had no knowledge of its existence at that time.

The article allegedly reports an interview with a top spokesman for U.S. Gypsum Company.

If it accurately presents the official policy of that company, then we must be extremely careful in our operations under Bulletin No. 157.

Since my aim herein is to clarify and not confuse, a brief explanation of the law, as I understand it, may be necessary for you to understand fully the position in which we now find ourselves. Our company's basic policy remains as [11,591] before—to be competitive in our pricing of gypsum products. Under the law we are free to do so long as our price is made in good faith to meet a lawful—

and he underlined the word lawful—

and equally low price of a competitor.

The underlined word lawful is the key to the entire situation. The courts have held, that a price-cutting program, if done with a so-called predatory intent, constitutes a direct violation of the Sherman Act. The test of the legality of any given price practice may vary depending upon the facts and circumstances of a particular case. It seems safe to say, however, that when a company is as large a factor of total industry volume as U.S. Gypsum Company is in the gypsum industry, the Government will look very carefully at any general price cutting by such a company. It may well be that circumstances could arise where the Government would take the position that such pricing action was with a predatory intent. Should that happen we would not be free to meet such lower prices.

The foregoing is intended solely for the purpose of keeping you especially vigilant and alert to discover and report to us any unusual [11,592] practices which you may encounter in your district in the pricing of gypsum products. Please keep us immediately and fully informed of any such developments so that we may be guided in determining our own policies.

Now—

Mr. FRICANO. If Your Honor please—

Mr. MCSWEENEY. Do you want to read it now or shall I ask my question?

Mr. KECK. Before Mr. Fricano reads anything, I would like the Court to advise the jurors that what he is about to read is the rankest kind of hearsay appearing in a publication we know nothing about.

This is a very prejudicial statement unfairly made that Mr. Fricano wants to read.

The COURT. It is a very limited offer. The only purpose of it is to show why Mr. Thompson wrote the bulletin he did and it does not—it is not offered for the purpose of showing this is or ever was the policy of United States Gypsum.

Mr. FRICANO. Thank you, Your Honor.

The COURT. Why do you want to read that Mr. Fricano?

Mr. FRICANO. Because it was offered in evidence and it was accepted and there was no objection [11,593] to it by Mr. Keck.

The COURT. I have changed my mind. I don't think that ought to be read.

Proceed.

By Mr. MCSWEENEY:

Q. Mr. Thompson, you issued this bulletin, Defendant Exhibit 20, because you were, were you not, advising the people to whom it went to comport themselves in compliance with the Robinson-Patman Act?

A. Yes, sir, and the Sherman Act.

Q. And the Sherman Act.

The COURT. Incidentally, if any member of the jury feels you want to read that attachment, it will be there.

You understand the reason I said I didn't think it ought to be read is it is an article in a magazine which caused Mr. Thompson to do what he did, but it is not necessarily accurate and it is pure hearsay.

By Mr. MCSWEENEY:

Q. You didn't accept that article——

A. No, sir.

Q. —as being accurate?

A. And I didn't discuss it with anyone in United States Gypsum Company, either. I was trying to advise our own sales people to be careful and know what [11,594] they were doing.

* * * * *

[11,615] * * *

Q. All right. And would you tell me, sir, why, with all the precautions that you took, all the forms the 350's, the 360's, that not once do we ever find an instruction to keep a record of the telephone contacts that Mr. Miller had?

A. Yes, I will be glad to tell you.

In the first place, Mr. Miller's contacts, or any of our other product managers' contacts, with competition are the exception rather than the rule. There would have been in my mind no purpose served for recording the facts that on such and such a date I telephoned so and so at a competitor's company. The purpose of the form was to provide a record of the competitive situation as we had found it, and as we thought we had proved it. So that when and if we should ever be challenged by a customer, or anybody else, with a discrimination complaint, we would know which company we thought we were meeting, and we would then be in a position to go to that company and ask their cooperation. If we couldn't get it, to subpoena their records and find out what their price to a certain customer on a certain day was. And we figured that would be the way to prove our defense in the event we might be [11,616] sued in a Robinson-Patman case.

Q. Bearing in mind your explanation now, sir, that the papers that you filed and kept were to serve to defend you in any Robinson-Patman case, keeping that in the forefront of your mind, did you not testify that you authorized Miller to make these telephone calls when he had doubt in his mind based upon the foundation documents, the supporting evidence from the market; isn't that your testimony?

A. My testimony was that when he had doubt in his mind as to the accuracy of the information that he had received from the field, he did not have a legal right in my opinion to meet that competition until he had exhausted all possible avenues of exploration of the facts. And one avenue which I told him he was free to pursue as a last resort would be to telephone the competitor's counterpart to find out if in fact such price existed with that customer at that time.

Q. So in that situation when the papers were not sufficient to enable you to meet that competition, he would call his competitor and then you would make no record of it; is that right?

A. That is absolutely right. Certainly we would make no record for the reason I have just explained, for if we needed that

information in the future, the form [11,617] explained what product, what customer, what company, and it would be simple enough then to go to that source if you needed the information as a defense of a lawsuit on a Robinson-Patman charge.

Q. Mr. Herbert wanted a record didn't he?

A. No.

Q. By the way, who is Mr. Herbert?

A. Mr. Herbert is presently the president of the Celotex Corporation.

Q. And at the time when he wrote a form which would require you people to keep a record of the competitor contacts, he wanted o[illegible] didn't he?

A. He was the executive vice president at that time. I really don't know what he wanted except as I have testified earlier what he told me on the subsequent occasion.

Q. But you were able to convince him, were you not, there should not be a record, and as a consequence, you edited out his desire?

A. No, sir, I didn't. That is not the way it happened. The form came to my desk. I read it. I made those changes. I put it in the out basket. I never saw it again or never heard of it again until some months later in a discussion with Mr. Herbert when he told me what he had in mind. The whole process at my desk of editing this form, as you call it, and making those pencil suggestions, [11,618] took me less time than it has taken me to give you this answer.

Q. Do you know Mr. Nelson?

A. Jack Nelson who testified here?

Q. Yes.

A. Yes.

Q. Did you hear Mr. Nelson testify that Mr. Miller told him on more than one occasion, one or two occasions, that Celotex did not contact its competitors on prices because that would be collusion and illegal?

A. I heard Mr. Nelson's testimony. I am not exactly clear of what all he said, but I heard it, yes, if that is what he said.

Q. All right, sir.

Did you also tell that to Mr. Miller?

A. No, sir. Mr. Miller was one of the few people at the sales office, the home office, that I have described previously whom

I carefully instructed as to the particular circumstances and the special occasions when I felt it was proper and legal for him to contact a competitor.

Now, if Mr. Miller told Mr. Nelson what you have just said Mr. Nelson testified, and I have no reason to believe he didn't, although I don't specifically recall it, he was simply carrying out the instructions that I had always given at the home office, that this was [11,619] a procedure which should not spread, should be supervised, controlled and confined to the specific purpose of verifying or checking, as we called it, the facts in a potential Robinson-Patman situation.

• • • • •

[11,633] Q. To the best of your recollection at this time now, sir, throughout the time period from 1960 through 1973, did Mr. Miller have contact with United States Gypsum?

A. During a portion of the time I am sure he did, yes.

Q. What portion?

A. Well, I recall in the last two or three years prior to '73 Mr. Miller telling me that U.S.G. has quit checking. Now, I can't place it any more specifically than that, but it was two or three years prior to the end of December of '73.

[11,634] Q. All right.

Now, in that connection, did Mr. Miller tell you why they quit checking, what reason they advanced?

A. No, he did not.

Q. He did not. All right.

Through a period from January 1960 through December 1973, did Mr. Miller have price contacts with personnel and officers of National?

A. Yes, I am sure he did.

Q. Now, in that connection, it wasn't just Mr. Miller who was engaging in these telephone calls throughout this time period at Celotex; was it?

A. You mean with respect to gypsum?

Q. Yes, sir.

A. No. I think that from time to time usually Mr. Miller—in Mr. Miller's absence he would have an assistant taking his phone calls, including this type of call that we have been discussing.

Q. Now, what personnel at Celotex, in addition to Mr. Miller, were engaging in these telephone conversations?

A. Well, I don't know as a matter of fact that they were, but I am confident in my own mind that in Mr. Miller's absence a part of the time Mr. Fisch—who was his assistant—probably did that. I also think that perhaps Mr. Ross may have taken some of the calls when he was working [11,635] for Miller.

But to testify of my own certain knowledge, I couldn't really do that.

[11,636] By Mr. FRICANO:

Q. How about Mr. Warren Hill?

A. Oh, yes. Excuse me. I forgot him. He would be another one in the same category; that's right. He was with us for two or three years.

• • • • •

Q. Now with respect to these telephone conversations from the period beginning in January 1960, through December [11,637] 1973, did Mr. Miller or others within the Celotex Corporation engage in the pricing discussions with personnel from Georgia-Pacific?

A. Mr. Miller had told me—and this I do recall—that he had talked with an A.L.E. Meyer on price verification matters.

• • • • •

[11,639] Q. Now, you have also testified, on direct examination, in connection with these conversations, that, number one, they were infrequent, and, number two, they were only engaged in as a last resort.

Now, with respect to those two points, sir, how do you know that they were infrequent?

A. Well, only as I would be in conversation, from time to time, with the people in the company who were making such type calls, they would occasionally say that they had to call so-and-so the other day.

Q. Well, is it fair to say, sir, that they didn't consult you in every situation; they solved some, themselves?

A. Absolutely; that is correct.

• • • • •

[11,644] By Mr. FRICANO:

Q. Now you testified on direct examination that you spoke and counseled not only Mr. Miller, but also Mr. Jarrett, the general credit manager. Do you recall that?

A. Yes, sir?

Q. You were present in the courtroom when Mr. Jarrett testified, were you not?

A. Yes, I was.

Q. Now on direct examination by Mr. McSweeney at page 11,535 in the transcript you were asked this question and you gave this answer:

> Now what advice, if any, about compliance with the Robinson-Patman Act and the Sherman Act did you give to the general credit manager from this period? Let's take from late '65 through 1973.

And then, in essence—and I could read your answer, sir—it goes on for just a little over half a page—in essence you said I told Mr. Jarrett the same thing I told Mr. Miller; this was permissible; that my reading of Container, the Container decision of the Supreme Court of the United States allowed Celotex to continue engaging in this practice.

Is that a fair summation?

A. No, it is not, because Container was not decided until 1969, so I couldn't have spoken about it from [11,645] 1965 to 1969.

Q. You are right. I am sorry. Let's put it this way: Up until Container that would have been correct, and your having read Container, that, too, would have been correct, the way I stated my question?

A. You will have to read that to me. I am confused.

Q. It is a bad question, sir. Let me start over.

Is it fair to say from 1960 through 1969 you told Mr. Miller he could engage in this practice?

A. Yes.

Q. And then subsequent to the Container decision in January of 1969, after you had read it, you still counseled him he could continue in this activity?

A. Yes.

Q. Would the same be true for Mr. Jarrett?

A. Mr. Jarrett came to us, as I recall it, in late '65 and whatever advice I gave him between that and 1969 would have been consistent with the same advice I was giving on the same subject to Mr. Miller.

Q. That is what I thought was your testimony.

A. That is what I intended to testify, as those are the facts.

Q. If that is true, why is it that Mr. Jarrett testified in this courtroom he told his subordinatees to stop in 1971?

[11,646] Mr. DELONE. Objection.

The COURT. Sustained.

By Mr. FRICANO:

Q. Did you hear Mr. Jarrett testify?

A. Yes.

The COURT. You cannot ask him why some other witness said something, Mr. Fricano.

Mr. FRICANO. Judge——

The COURT. I have sustained the objection. You do not ask one witness why somebody else said something, which is exactly what your question was.

Mr. FRICANO. All right.

By Mr. FRICANO:

Q. Please look at 1011, Government Exhibit 1011, which is in evidence.

Government Exhibit 1011, which is dated January 10, 1972, is a memorandum to all regional credit managers, the subject of which is competition, with a copy to R. Thompson and it is written by Mr. Jarrett, your general credit manager.

In it he states:

> From this day forward no one is to contact our competition to determine if they are extending extra terms to anyone, in particular or in general.
>
> We will continue discussing the "normal" [11,647] credit information with competition, but never anything other than this.

Did you instruct Mr. Jarrett to do this?

A. I did not.

Q. Did you approve of what he did?

A. I didn't know anything about it until after it was issued and I got my copy. It made no difference to me, if he decided

that was the way he wanted to run his Credit Department. He was responsible for the job. I have no objection to his discontinuing this type of verification. I never instructed him to carry it on.

Q. If it helped Celotex to abide by the Robinson-Patman Act, weren't you duty bound by the company to tell Mr. Jarrett he was wrong?

A. No.

Q. So in this particular instance, is it fair to state Mr. Jarrett ignored your advice?

A. No.

Q. Is there any thing in writing that you have either written or seen which specifically authorizes Mr. Miller and others at Celotex to engage in this practice of discussing prices with competitors?

A. I believe not.

Q. You testified on direct examination that the form which the conversation between Mr. Miller and his [11,648] competition was to take was to be limited and narrow, just seeking information and in terms of yes or no answers to specific questions dealing with specific companies, is that not correct?

A. That was my advice to them, yes, sir.

Q. If Mr. Miller engaged in these telephone conversations with his competitors and during the course of these conversations they went far more ranging, in other words, with explanations for price cuts being given, things being said like, "This is a one-time deal and we are not going to do it any more," would that have been within his authorization?

A. If that happened, it would have been outside the advice that I had given him, yes, sir.

If they talked about the weather or how are you, I suppose that would be part of a normal conversation.

Q. Suppose in the course of his conversation he imparted information to his competitors such as instructions to the president of Big Horn Gypsum to sell only on the basis of list prices.

A. Mr. Miller, to my knowledge, never gave any instructions to Big Horn Gypsum.

Q. Maybe you didn't—maybe my question wasn't artfully enough stated.

I am saying assuming Mr. Miller or Mr. Hill, [11,649] as the case may be, would tell the competitors when engaging in one

of these pricing discussions that he had been advised by Mr. Walter, the president of the corporation, or someone working for Mr. Walter——

A. I am trying to follow you, sir. Go ahead.

Q. If you don't understand my question, sir——

A. I am listening.

[11,650] By Mr. FRICANO:

Q. If Mr. Walter had advised Hildebrand at Big Horn to sell only at list prices, would that have been within the sphere of price checking as you have described it?

A. If Mr. Miller or Mr. Hill told somebody in a competing company that Mr. Walter had told Mr. Hildebrand something, it would be pretty hard for me to answer the question.

Q. Perhaps you could look at document 713.

[An exhibit is handed to the witness by Mr. Grainer.]

By Mr. FRICANO:

Q. Now, document 713 is from the files of Georgia-Pacific, and not from the files of Celotex. But it shows a competitive situation on February 3, 1966 concerning the Big Horn Gypsum Company, and an allegedly lower price being offered in the marketplace.

Now, you can't tell from this, Mr. Thompson—and I recognize it, and I am sure the jury does, that Mr. Miller didn't write this. Someone at Georgia-Pacific wrote it. But if it were true, the handwritten note here which says, "No!", wouldn't you have instructed Hildebrand to sell on the basis of list price only, assuming that to be a true representation of what was said; would that be within your policy?

[11,651] Mr. MCSWEENEY. I object to the question.

The COURT. Sustained.

On numerous occasions at your request I instructed the jury that such comments were not admitted in evidence for the purpose of proving the truth thereof. So you can't use it on that basis.

Mr. FRICANO. Well, I was using it hypothetically, Your Honor.

The COURT. You can ask a hypothetical, but not by referring to a document and reading it. That is not hypothetical.

Mr. FRICANO. I think possibly——

The COURT. Don't think after I make a ruling. Comply with it.

Mr. FRICANO:

Q. Well, sir, hypothetically speaking——

The COURT. Now, that means ignoring that document altogether.

The WITNESS. I understand, Your Honor.

The COURT. I had forgotten for a moment your position.

The WITNESS. Thank you, sir.

By Mr. FRICANO:

Q. Hypothetically speaking, if Mr. Miller did give out this advice, or Mr. Hill gave out such advice, or such [11,652] information, not advice, would he be within the policy as you have enunciated it?

A. There would have been nothing wrong in the policy as I enunciated, it the way you expressed it, in Mr. Miller or Mr. Hill saying that Big Horn Gypsum was selling at its published prices if they knew that to be a fact.

Q. Well, that is not a yes or no answer, is it?

A. I can't answer some of your questions yes or no the way you phrase them.

Q. Isn't it also true that neither could Mr. Miller?

A. I think Mr. Miller would if he could, and wouldn't if he couldn't, yes, sir.

Q. Again, hypothetically speaking, if Mr. Miller had a telephone conversation with Mr. A. L. Meyer of Georgia-Pacific or Mr. Sikes of Georgia-Pacific, and during the course of which he imparted to Mr. Miller or Sikes as the case may be, the fact that Celotex had no deals of any kind in the United States, would that be within——

A. I think that is another way of saying that we are selling at our published price.

Q. Does that relate to specific accounts when someone says, generally, to a competitor, "We are selling at our list price," or, "We have no deals in the United States"?

A. That relates to all accounts, if they could ever truthfully make such a statement.

[11,653] Q. Would that be permissible the way you have described the practice?

A. Yes.

Q. I thought you testified that it could only be to a specific account in a specific situation?

A. That was in the event of an alleged exception to our published price. We would be glad, if the facts were justified, to advertise that we sold at published prices. Very frequently we are unable to do so. But my testimony has been with respect to requests for exceptions from published prices.

Q. Just so the record will be clear, Mr. Thompson, if an inquiry were made of Mr. Miller concerning a specific customer, and Mr. Miller denied that Celotex was deviating from its published prices at that time, and then went on to say, "And furthermore, we don't have any deals in the United States at all," is that permissible?

A. It would have been all right in my opinion.

Q. Would it have also been permissible hypothetically speaking for Mr. Miller to have a discussion with his competitor concerning whether or not that competitor would continue to truck into 36 counties in the southern tip of Nebraska?

A. Mr. Fricano, as I understand the Robinson-Patman Act, which we have discussed, it relates to price, service [11,654] and facilities, and I think truck delivery, if it isn't a facility, it certainly is a service. So I would not have advised Mr. Miller or anybody else, that questions within that realm were prohibited in my opinion.

Q. So that would have been prohibited?

A. They would not have been prohibited.

Q. So you could have a discussion concerning an entire marketing area, and whatever practice that competitor may be engaged in?

A. I wouldn't say discussion. He could have asked a question or answered it if it would have been put to him if we were trucking into certain states, and a competitor followed, there would have been no reason why he shouldn't have said, "Yes, we are trucking."

Q. Mr. Miller, was he empowered also to ascertain over the telephone or face-to-face situations with respect to competitive terms?

A. Mr. Miller had very little to do with terms. I believe, I think, terms were established by others. If he had a report of a discount in excess of that, he might have passed it on to the credit people.

Q. Would it have been permissible under your instructions for Mr. Miller to discuss ways and means of eliminating applicator discounts in a particular market?

A. I doubt it. I don't recall that we had [11,655] applicator discounts, but I need to know more about the facts of the situation before I could answer that yes or no, Mr. Fricano, as far as my opinion.

Q. Assuming hypothetically in a particular market that there was a practice in that market to certain applicators of giving them $2 beyond what the dealer was getting, that this is just to give them $2, "If you buy my board"; would it be permissible for Mr. Miller to discuss with his competitors ways and means of eliminating that $2 to that applicator?

A. No, I don't think we ever discussed future action with a competitor.

Q. So that would have been impermissible, correct?

A. The way you put it, I think it would have been, yes, sir.

Q. Was it permissible, again hypothetically speaking, for Mr. Miller to discuss whether or not price protection would be offered on a pending price increase?

A. I think price protection is a part of price. Yes, we would have to know, or we would want to know, if we could, the situation with respect to price protected jobs.

Q. So then it would have been permissible for Mr. Miller, between the announcement date of a price increase and the effective date of a price increase, to [11,656] check with his competitors with respect to alleged job price protection which would extend beyond the effective date of the price increase?

A. If he had a report from our sales people in the field that a competitive company was protecting the price on such and such a job, I would have had no objection to him calling whomever he might know in a competing company to ask if it were true that they were protecting the price on such and such a job.

Q. Would it have been permissible for Mr. Miller to call his competitors in order to ascertain whether or not a recent change in credit terms was being followed by all manufacturers?

A. No, he couldn't call one to ask what all were doing.

Q. Well, let's assume, again, hypothetically, that he picks up the phone and he calls someone at one of his competitor

companies three or four days after a terms change has been instituted and says to him, "Have you heard whether or not anybody else in the industry has deviated from the new terms?" Would that be permissible?

A. I don't think so.

Q. Would it be permissible for Mr. Miller in a competitive situation where he is being called by the competitor to ascertain whether or not there has been a [11,657] price deviation—and I will have to set this up on a hypothetical, Mr. Thompson.

Let's assume that a competitor calls Mr. Miller and says, "I understand that you are offering 5 per cent off list price to this customer," and Mr. Miller knows that he is not giving 5 per cent off on that list price, but he is giving 2 per cent off; could Mr. Miller then volunteer to that competitor the fact that, "No, it is not 5 per cent, Mr. Competitor, but it is only 2 per cent"?

A. Could he?

Q. Under your policy as you have set forth, could he do that?

A. Well, let's put it this way. I don't think he would have, but if he had, I don't believe that I would have condemned him for it. He would be simply reporting a fact.

Q. Well, assume again that the competitor calls him and says, "Mr. Miller, are you going to increase your prices along with everybody else?" And Mr. Miller knew that he was going to increase his prices because he had his price announcement right in his hand, and that was a fact; could he tell his competitor that?

A. Not unless he already moved on it and issued his announcement.

[11,658] By Mr. FRICANO:

Q. So there are certain facts you can convey and certain facts you can't?

A. You can't discuss future facts, or facts to arise in the future.

Q. Would it have been permissible for Mr. Miller—hypothetically speaking—to convey to his competitors the method by which Celotex would rid itself of its accounts receivable generated by reason of extended credit terms?

A. I don't think so, no. I don't believe that would be any of their business.

Q. That would be an internal policy?

A. That would be an internal decision, yes, sir.

Q. Would it be permissible for Mr. Miller to check on a competitive—an alleged competitive deviation, price cut—call it what you will—not because he wanted to meet it, but only to find out if it were so?

A. I don't believe that I would have countenanced that kind of conduct if he had asked me, because ordinarily he would only inquire if he intended—all things else being equal—to meet the competitive price. And if he were prompted by idle curiosity with no intention of meeting it, I think I would have told him not to make the phone call.

• • • • •

[11,669] Q. Would it be fair to say, then, that Celotex had an agreement with its competitors to exchange this pricing information?

A. No, I don't think that is fair at all.

[11,670] Q. Why not?

A. I think that is not correct.

Q. Why not?

A. I know of no such agreement, because the information was often given, probably, usually given, but also frequently refused.

• • • • •

Q. Do you know how the practice started?

A. I haven't any idea. I do know it was in effect when I came to Celotex in 1942.

• • • • •

[11,672] Q. If the form 350 cancels existing job price [11,673] protection, and it would, would it not?

A. No.

Q. It would not?

A. No.

Q. That was the exception?

A. The form 350 would cancel the quotation to a dealer or a price in effect to a dealer.

Q. So you treated job price protection differently?

A. I think we did.

Now, here again, Mr. Fricano, I am not an expert on the details of how our 350's were handled, but I don't recall that we used—and I could be wrong—I don't recall that we used a 350 in a price protection situation.

• • • • •

By Mr. Fricano:

Q. 2124–A, which is in evidence, deals with the Celotex policy for document retention and document destruction. Are you familiar with it?

A. I am familiar with the policy, yes, sir.

Q. Now, this document which is in evidence sets forth in its pages the method by which documents could be [11,674] removed from the files and destroyed. It talks about a four-year waiting period for certain types of documents does it not?

A. Yes, sir.

Q. And of course, copies of these documents went to the Legal Department, did they not?

You will notice on the subsequent pages copies are to Mr. Gaudry. It says Legal Department.

A. Yes, I see that.

Q. Now, on the last page of this exhibit you will notice that there are 11 cases of correspondence of Celotex that were destroyed for the period 1966, 1967 and 1968 and the destruction date is February 4, 1970.

Now possibly the 1966 documents might come within that four-year document restruction, might it not?

A. Excuse me. I was having trouble finding——

Q. Are you looking——

A. Yes, at the last page, February 4.

Q. If you look at quantity, you will see that the last three numbers, 4, 3, 4, which add up to 11 cases of correspondence destroyed for the years 1966, '67 and '68.

A. Yes. Somebody had put in a 16 here and I was trying to get the arithmetic straight. It is 11. You are right.

Q. If you accept the four-year document retention [11,675] rule one could say that perhaps the 1966 destruction was within that four-year policy. It could be, could it not?

A. Yes.

Q. But it couldn't be argued for 1967 and 1968?

A. Well, our general policy—of course, this four letter abbreviation, corr, which I think means correspondence, our general policy was correspondence was destroyed after two years, but that is not in the first memorandum that you referred to and I don't have any idea what the contents of '66, '67 and '68 11 cartons were.

Q. Sir, it says here the reason for the destruction, and it states, "No longer needed per Don Miller," does it not?

A. Yes, sir.

Q. Did Mr. Miller consult with you at this time when he authorized the destruction of 11 cases of correspondence?

A. I am quite certain he did not.

Q. Now perhaps he didn't consult with you concerning it. Did he ever tell you why he did it?

A. No, sir.

Mr. FRICANO. I don't want to interrupt, but I am reading these documents that you referred to me here and I notice the memoranda from Mr. Hill says that this will mean that only a small portion of this department's files will have to be retained for a four-year period to satisfy [11,676] legal requirement. The balance of the files will be discarded when they become two years old.

That would be in line with what I just described as our general policy as to general correspondence.

It is the second document in the group.

Q. Sir, doesn't the first page of that state, "based on the law which requires us to retain for four-years all correspondence and other written data relating to price, quotes and bids written to customers" and I understand it states, according to the document, the last page says correspondence.

A. It doesn't say correspondence relating to prices, quotes and bids. There is lots of correspondence that doesn't relate to that.

• • • • •

[11,685] REDIRECT EXAMINATION

By Mr. MCSWEENEY:

Q. Mr. Thompson, Mr. Fricano asked you a question about conversations with Mr. Miller concerning what companies he said he had verified with.

And Mr. Fricano used the time frame 1960 to December 27, 1973. And, in respect to your answer that Mr. Miller had talked to someone at National Gypsum,was there any particular time in that period you can place upon that?

A. Well, these conversations with Miller—you are talking about the fact that they had ceased to respond to calls or——

Q. Did Mr. Miller tell you that at some time?

A. He told me that National was no longer taking or making calls.

Q. During what period? When did Mr. Miller—When do you place that Mr. Miller told you that?

A. Well, it would have been within the last two or three years prior to my retirement—which was a year ago. So, counting backwards, it would have been '70, '72, '73, somewhere along in there. I just don't remember with any——

Q. You don't recall?

A. No, sir.

[11,686] Q. When you answered his question as to Mr. Miller saying that he had made calls to National, you were just saying some time in that period——

Mr. FRICANO. Object to the form of the question.

By Mr. MCSWEENEY:

Q. [Continuing]. In 1960 to 1973 Miller said that to you?

The COURT. The objection is that it is leading, and it is sustained.

By. Mr. MCSWEENEY:

Q. Did Miller ever say anything to you about whether or not U.S. Gypsum was still making calls to him or receiving calls from him on verification?

A. Yes, he did.

Q. Did he tell you that what——

A. Well, it was also about that same time, as I say, two or three years before I retired, he said that U.S.G. was no longer checking.

Q. I see.

Now, Mr. Thompson, with respect to the Celotex document which was Exhibit 2124–A, Government Exhibit, which related to the Celotex file retention period——

A. Yes, sir.

Q. I call your attention to the language in the second paragraph on the first page which is:

[11,687] Based on the law which requires us to retain for four years all correspondence and other written data relating to prices, quotes, and bids to customers as it relates to specific jobs, or as the correspondence supports information on 360 and 350 forms, I believe the following files—which probably contain such information—should be retained for that four year period:

Then he lists specified files; is that correct?

A. That's correct, yes, sir.

Q. And then the policy—without reading it—the policy says that except for the files which Mr. Gaudry here enumerates, the Merchandise Department need not retain other files except as they might need them themselves; is that correct?

A. Yes, that's correct.

Q. So, pursuant to the written policy of Celotex, the so-called other correspondence files could have been disposed of prior to four years; could they not?

A. Yes, sir. Our normal period was two years.

Q. And that would have been completely in keeping with the policy which Mr. Gaudry wrote out here; would it not?

A. That's correct.

Q. Now, Gaudry was one of the lawyers in your department.

[11,688] Did he have the responsibility of supervising this file retention period with this Gypsum Department, Gypsum Merchandising Department?

A. Well, yes, that was one of his responsibilities with respect to the whole company.

Q. I see.

A. Including gypsum merchandising.

Q. Including gypsum.

I take it that in formulating your document retention policy you would consult various authoritative periodicals on the subject, including those published by the United States Government; would you not?

A. That's where we always started. Every time they issued a new guide for record retention we'd get a copy of it and study it to see how it compared with our existing policies, and we would change or modify our accordingly, if the needs were shown.

Mr. McSweeney. That's all I have, Your Honor.

Mr. Fricano. Nothing, Your Honor.

[11,689] By Mr. DeLone:

Q. Mr. Thompson, you have testified, under cross examination, that you were aware that, at that—between 1960 and 1973, Mr. Miller had, on occasion, had conversation—had these verification or checking conversations with persons in National Gypsum, whose names were unknown to you.

A. If I said the names were unknown, I misspoke myself, because I know he has used the names of John Brown and Kenneth Atwell.

Q. Very well. Now, do you know of any particular conversation at any particular time during this whole period, '60 to '73—do you recall any particular——

A. I do not.

Q. And do you recall that, at some time, several years before your retirement, Miller said that National was no longer verifying?

A. Yes. He said they no longer were checking prices.

Q. And is it accurate or fair—is it accurate, then, that you are not able to say when Mr. Miller stopped having such conversations with National Gypsum?

A. No, I cannot place that with any degree of certainty, Mr. DeLone.

Mr. DeLone. No further questions.

Mr. Keck. Your Honor, I would like to ask a question or two.

[11,690] By Mr. Keck:

Q. Mr. Thompson, you referred, similarly, to Mr. Miller having told you at some time that he was not obtaining any answers from U.S. Gypsum. Did he disclose any individuals in that regard, names of any individuals?

A. I don't think so. I don't really believe—I have no idea who he had previously checked with at U.S. Gypsum. I just don't recall.

Q. Do you have any knowledge at all about when he might have last checked with someone at U.S. Gypsum?

A. Not with any more certainty than I said, two or three years before I retired.

Q. But you don't know when it happened then, do you?
A. No, sir; I do not.
Mr. KECK. Thank you.

RE-CROSS EXAMINATION

By Mr. FRICANO:

Q. You say you misspoke yourself with respect to John Brown and Ken Atwell. Can you recall, now, anyone else in the employ of competitors that Mr. Miller had conversations with?

A. I don't think I said I misspoke myself. I said if I had testified—and I don't remember whether names were mentioned in connection with the National Gypsum—if I had testified that I don't know any names, then I misspoke [11,691] myself, because I do recall Miller mentioning those two people. No, I don't know with whom he was carrying on these conversations with other companies, Mr. Fricano.

Q. Other than Mr. Malhiot at Flintkote?
A. Malhiot and—because of the name, and——
Q. A. L. Meyer?
A. A. L. E. Meyer.
Q. And not Mr. McCaskill?
A. I don't recall ever having heard Mr. McCaskill mentioned in that connection.
Q. Or Mr. Gimlin, from United States Gypsum?
A. No, I don't remember that name.
Q. With whom did you speak at the recess?
A. With Mr. McSweeney, with Mr. Keck, with Mr. Mellott.
Q. Did you speak to Mr.——
A. Mr. Fisch.
Q. Did you speak with Mr. DeLone or anybody in his——
A. No, I didn't.
Q. Did you talk about your redirect examination?
A. No, sir.
Q. You didn't discuss any part of it?
A. Well, let's put it this way. Mr. Keck asked me if I could be any more specific as to when Mr. Miller told me USG was no longer making or receiving these calls, and I told him I couldn't.

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[11,696] JERRY FISCH, called as a witness, and having been duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By Mr. MCSWEENEY. Q. Would you state your name, sir?

A. Jerry Fisch.
Q. Can you get up there so that the jury can hear you? Talk into that microphone, please.
A. Yes.
Jerry Fisch.
Q. Where do you live, Mr. Fisch?
A. 615 Riviera Drive, Tampa, Florida.
Q. By whom are you employed?
A. Celotex Corporation.
Q. What is your job?
A. National account executive.
Q. During what period of time have you been employed by Celotex?
A. From August of 1967 to November of 1973, and then from March of 1975 to present.

• • • • •

[11,703] Q. Now, from time to time when you were there as Mr. Miller's assistant, what evidence did you get or receive from the field as to the fact of a—purported fact of a reported competitive situation?

A. We would sometimes get an invoice. The salesmen would obtain an invoice from the customer. Sometimes we would get the customer to sign our 156 Form. Sometimes it was just a salesman getting the name of the competitive salesman who had offered the price to a customer, and once in a while when I would travel in the field, the customer would tell me he had been offered the price and I would, on occasion, tell the salesman to initiate the 350 at that time, if he so desired.

Q. Now, Mr. Fisch, did you ever verify a report of a competitive situation with a competitor?

[11,704] A. Yes, I did.

Q. Did you receive some instructions from someone with respect to such verification communications?

A. Yes, I did.

Q. From whom did you get such instructions?

A. Mr. Miller.

Q. What did Mr. Miller say to you or what instructions were they that he gave to you with respect to this matter?

A. He told me that he had been instructed by Dick Thompson that it was legal to verify with a competitor where a customer had already been offered a price by competition; that we were allowed to ask about a particular account and about a particular price, and that from time to time he would authorize me to make these calls, but they were to be kept to a minimum, and that I was to discuss nothing else with the competition except to ask the question and get off the phone.

But, in any case, I was not to initiate any of these calls myself and there would be very few of them made.

Q. What instructions, if any, did Mr. Miller give you about receiving any such calls?

A. He told me that I could take such calls and I was to ask, as he had previously explained to me, that I [11,705] was to answer specific questions about a specific account, and not to get into any general discussion.

Q. When was it, Mr. Fisch, that Mr. Miller gave you these instructions?

A. Shortly after I came to Tampa as field manager. That would be in the fall of 1969.

Q. In discussing this matter with you, did Mr. Miller tell you the purpose of these verification calls with competitors?

A. Yes, he briefly outlined the Robinson-Patman Act as it affected our business and told me that if we inadvertently met a competitive situation that did not, in fact, exist, then we would be in violation of the Act.

Q. Did he tell you what his attitude or practice was with respect to verification calls?

A. Don felt that he liked to run his own—Don Miller felt he liked to run his own business and he did not like to make those kind of calls. He said that by the nature of the call, when you made it, you alerted your competitor to the fact you were interested in doing business with a particular account, so it

was not in a good business sense the thing to do, and the only reason we did it was for legal reasons.

Q. Now did Mr. Miller, according to your observations, [11,706] consult from time to time with Mr. Thompson on legal matters relating to the gypsum wallboard business or the gypsum merchandising department?

A. Yes, frequently.

Q. What knowledge do you have about Mr. Miller's consultation with Mr. Thompson on such matters?

Mr. FRICANO. Objection, unless it can be shown that the witness was present when such conversations occurred.

The COURT. Isn't that the question?

Mr. MCSWEENEY. I am asking him how he knows this.

Mr. FRICANO. I misheard the question.

The COURT. All right.

The WITNESS. Could you repeat the question?

By Mr. MCSWEENEY:

Q. I will rephrase it.

You mentioned that Mr. Miller from time to time consulted with Mr. Thompson on legal matters pertaining to gypsum or the merchandising department. How do you know that? Did you observe it, or what? Tell us how you knew that.

A. Mr. Miller was very vocal about—he was very conscientious about operating within the framework of the [11,707] law. He would tell me he would go up to see Mr. Thompson and he would tell me when he came back down what he discussed.

[11,708] Mr. FRICANO. Objection. I move to strike. It is obviously hearsay, the conversation which Mr. Miller had with Mr. Thompson as recorded.

The COURT. He hasn't said what the conversation was yet, has he?

Mr. FRICANO. Whatever it was, Your Honor, wouldn't it be hearsay?

The COURT. Not that there was a conversation.

The contents of the conversation would be, but so far there has been no hearsay asked for or testified to.

Mr. FRICANO. Yes, Your Honor.

By Mr. MCSWEENEY:

Q. All right. May we have the answer, please, read back as far as Mr. Fisch got.

Mrs. WIKE. "Mr. Miller was vocal about—he was very conscientious about operating within the framework of the law. He would tell me when he would go up to see Mr. Thompson, and he would tell me when he came back down what he discussed."

By Mr. MCSWEENEY:

Q. I don't know from that whether you finished or not, did you?

A. Yes, sir.

[11,709] Q. You have finished your answer. Thank you.

Now, what if anything did Mr. Miller tell you about verifying with United States Gypsum?

A. Shortly after I came, when we discussed these types of subjects, he told me that U. S. Gypsum does not talk to us about any matter, and we do not talk to them.

Q. When you say shortly after you came, you mean shortly after you took the job as his assistant in the fall of 1969?

A. I am sorry. Yes, that is correct.

Q. Now, did you in your experience as an assistant to Mr. Miller encounter Form 350 requests where they reported competition with Georgia-Pacific?

A. Yes, I did.

Q. How did you respond to the competition of Georgia-Pacific?

A. There was a particular problem with Georgia-Pacific in that their warehouse operations had become prominent, I would think, just about the time that I had come to Tampa as field manager for gypsum. The warehouse operations ran specials sometimes on a daily or a weekly basis, sometimes on a monthly basis. But they would occasionally sell pallets of gypsum wallboard, 50 pieces of board, for the price we would be selling a truckload of gypsum for, which made it very difficult, if not impossible, for us to compete on a short-term basis. What we did was ignore their short-term competitive situation and look at their long-range operation.

Q. What if anything did Mr. Miller tell you about verifying with Georgia-Pacific.

A. Well, again, because of this predominance of the warehouse operation, I had an occasion, as I recall, to take a 350 into his office, which was shortly after I had again taken the

job in Tampa. And he said it would be useless to make any attempt to verify in that particular 350 because the warehouse operation—the warehouse managers at the warehouse operation were autonomous to some degree, and that he had had occasion to try to verify another 350 with Georgia-Pacific shortly before the one that I brought in, and that he was told that he could not verify it because the control was in the hands of the warehouse manager, control for pricing.

Q. Mr. Fisch, when you were there as Don Miller's assistant at Celotex, about how many verification calls did you personally initiate?

A. Maybe a half a dozen.

Q. And while you were in that job, how many 350's did you act upon?

A. Many thousands.

Q. Now, in making verification calls, did you follow [11,711] the instructions Mr. Miller had given you as to the limits of the conversations you were to indulge in in those verification calls?

A. Yes, sir. I certainly did.

Q. On these occasions when you did make verification calls, to what companies, or if you remember, what persons did you make them?

A. I remember speaking to a man named Maddox at Grand Rapids, and I spoke to Chester Abbey a few times at Flintkote.

Q. When you say Grand Rapids, are you referring to the Grand Rapids Gypsum Company?

A. Yes, sir.

Q. Did you ever talk to Gene Burch of Georgia-Pacific in any respect?

A. Yes, sir.

Q. In what respect, or about what did you talk with Mr. Burch?

A. Well, Don Miller had a heart attack in either late February or early March of 1970, and I remember Gene Burch calling to inquire as to his health.

Q. Is that all you talked about with him?

A. Yes, sir.

Q. Did you ever make a verification to or with National Gypsum Company?

[11,712] A. Not to my recollection.

Q. Did you ever in general now, in general, receive verification calls from other gypsum manufacturers?

A. Yes, I did.

Q. Now, during your time there as Mr. Miller's assistant, how many such calls, that is, verification calls, did you receive?

A. Maybe seven or eight.

Q. From whom, what persons or what companies, did you receive such verification calls?

A. From the same two people that I spoke to, Mr. Maddox and Chester Abbey.

Q. Now, did you respond, or what did you say in response to such calls?

A. I answered them as I was instructed to. I gave an answer and nothing else.

Q. As Miller had instructed you?

A. As Miller had instructed me to do.

Q. On your observation, how many verification calls did Don Miller make when you were his assistant.

A. I would estimate on an average of one a month.

Q. With whom to your knowledge did Don Miller make verification calls, or to whom?

A. To the same people that I spoke to.

Q. Did you ever overhear—were you ever in his [11,713] office or near him by the phone when Don Miller made a verification call?

A. Yes, sir.

Q. Did he stay—in his call where you heard him, did he stay within the limits of the conversation that he had instructed you to observe based on Mr. Richard Thompson's advice?

A. Absolutely.

Q. Did Mr. Miller ever talk on the phone with anyone at National Gypsum about the rock contract?

A. Yes, that was right after I came to Tampa. That would late '69, possibly.

Q. Did he ever, Mr. Miller, that is, ever talk to anyone at National concerning the paper contract?

A. Yes, he did.

Q. Did he, Mr. Miller, sometimes talk to the Flintkote Company about the buy-sell or exchange agreement on gypsum wallboard?

A. Yes, he did.

Q. Now, Mr. Fisch, where a Form 350 was approved, did you determine whether Celotex actually made sales to the customers at their lower price?

A. Yes, I—that was part of my responsibility. I periodically, possibly once a month, would cross the 350's against actual sales to see how many sales were [11,714] actually made after we approved a 350. We were trying to reduce the amount of paperwork whenever necessary, and we had informed our people that we didn't want to see 350's unless they felt they were going to get some business.

Q. Based upon your observation there, can you state in how many instances when you approved or when a 350 was approved did Celotex make the sale to the customer at that price?

A. About 90 per cent of the time.

Q. Did the gypsum merchandising department, when you were there, act on 350 requests for exceptions to Celotex' regular terms of payment?

A. Yes, we did.

Q. Now, under what circumstances were such requests approved?

A. If the credit department had approved a request which in our mind meant they checked it for exposure and reasonable validity, then we should automatically approve it.

Q. They would indicate that to you for forwarding the 350, would they?

A. Right. The 350 would be sent initially to the regional credit office, then they would forward it to the credit office in Tampa, then credit would send it up to us for approval.

[11,715] Q. Now, did the gypsum merchandising department at Celotex have responsibility for initiating changes in Celotex' published list prices?

A. Yes, we did.

Q. Under what circumstances when you were there were such changes made in published list prices?

A. Well, we usually followed—when one of the majors acted, then we would follow and publish shortly after they had. We tried once or twice, I think twice as I recall, to initiate a change, but were unsuccessful.

[11,716] By Mr. McSweeney:

Q. Well, in that respect about majors, when you say you waited—well what companies were you looking for or at? What ones did you wait until they acted?

A. Either U.S. Gypsum or National Gypsum. Or possibly Georgia-Pacific.

Q. Where you mentioned that once or twice, possibly twice, you tried to be out with the published price list first, where did that occur?

A. Once in Texas, and once as a general increase nationwide.

Q. And you say that they did not stick or hold, or whatever term you used?

A. No. Neither one was effective.

Q. Mr. Fisch, I would ask you if you would, sir, to look at Defendant Celotex Exhibits 27 through 32, if they are there on the desk.

A. Yes, I have them.

Q. What are they, sir?

A. These are Don Miller's monthly reports. They start in November '69 and go November, December, January—this is in '70 now—June, July of 70. And, August of '70.

Mr. McSweeney. Your Honor, I offer Defendant Celotex Exhibits 27 through 32.

• • • • •

[11,746] Q. • • • Are you familiar with the fact that Celotex stopped using wooden pallets on gypsum wallboard in Michigan, or at least in part of Michigan, in June of 1971?

A. Yes, I am.

Q. Had Celotex, prior to that, been charging the customer for pallets?

A. No, sir.

Q. When the Celotex Company eliminated these wooden pallets on gypsum wallboard, did it, Celotex, reduce its price?

[11,747] A. No, sir.

Q. When the company, Celotex, would make up and decide on its price list for Michigan when you were using wooden pallets, was the use of pallets a factor in determining that price list?

A. No. Pallets were never considered in a price.

Q. Now, were the list prices and zones—you had zones for your list prices; did you not, sir?

A. That's correct.

Q. Were the list prices in zones other than Michigan higher than the prices in the zones say in Ohio and Illinois because of these pallets in Michigan?

A. No. They were the same.

Q. Pallets were not considered then?

A. Pallets were never considered when we were fixing price.

• • • • •

[11,749] • • •

By Mr. McSweeney:

Q. Do you know what, prior to June of '71, what counties into which you shipped wallboard on wooden pallets?

A. Yes, sir. Wayne County, Detroit.

Q. That's Wayne County?

A. Specifically, yes. Well, Detroit is in Wayne County. I am not sure that covers the whole—I know we shipped pallets into the Detroit market, which is in Wayne County.

Q. Now, with reference to certain of these price lists which are dated June 14, 1971, which are Defendant Celotex Exhibits 67, 68, 69 and 70, for how long did these remain in effect?

A. As it turned out, they remained in effect until late '73 because of the price freeze.

Q. So that you didn't have any new price lists after these of June 14, '71—at least in this area—in effect until some time in '73?

[11,750] A. Late '73.

Q. Late '73.

And is the price freeze you are talking about the Federal Government price freeze?

A. That's correct.

Q. Now, in these price lists, 63 through 67, which are dated for April 1 effective date, is the price for Wayne County of say

half-inch wallboard the same as it is in the other counties in Michigan and in the other states that you have referred to?

A. Yes. It is the same on all four price lists.

Q. And then going to the price list of June 14, 1971, which are 67 through 70, Mr. Fisch, are the prices for half-inch wallboard in Wayne County the same, or is it the same as the prices in the other counties in Michigan and in the other states on these price lists, namely Illinois, Indiana, Iowa, Kentucky, Nebraska?

A. Yes, they are all the same.

• • • • •

[11,735] Q. Well, did Mr. Miller ever tell you to deny to any of the sales arm of Celotex that you were contacting competitors if you were asked by them?

A. No. I don't recall us ever having a discussion.

Q. Were you ever asked by the sales force of Celotex whether or not you were contacting competitors on prices?

A. Yes, sometimes.

Q. You were asked?

A. Sometimes.

Q. What did you reply?

A. I replied, "No, we do not call competition," as the general statement. They asked, do we call our competition to get general information; I said, "No, we did not."

Q. But you do, or did?

A. No, we did not. We called on a specific instance, but never to get general information from them.

• • • • •

[11,766] MARSHALL GODDARD, called as a witness, and having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By Mr. MONTGOMERY:

Q. As you previously testified, you were formerly employed by Celotex, but you have now retired?

A. That is correct.

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[11,774] Defendant Celotex Exhibit No. 24 was received in evidence.

Mr. MONTGOMERY. Your Honor, I would like to read a portion of this to the members of the jury.

[11,775] This is a memorandum from Mr. Hill to Mr. Buckland, dated August 26, 1965, and bears a caption: "Proposal, Transmittal of Competitive Pricing Information."

And it shows a copy to Mr. Goddard as well as to other individuals.

The last paragraph on the first page.

> Recent price changes throughout the country have resulted in a change in the number of teletyped approvals and '350's' that are processed. The increased volume of competitive stiuations has resulted in a general slowdown of 350 processing due primarily to the lack of personnel in the district offices and in the Merchandise Department to handle this expanded work load. Since price changes have occurred in certain areas as frequently as two or three week intervals, and have been known to occur within two or three day intervals, any delay in submitting 350's can result in the forms being outdated before they are processed. This, of course, causes confusion on the part of the people writing the 350's and particularly in the Order Department, where they rely on the form 350 for billing information."

Continuing on the top of page 2.

> Granting approval by teletype to meet competitive price exceptions also has its drawbacks. No two [11,776] districts submit information in the same manner, even though all districts have been given a format to follow. When districts do not follow the format, they frequently neglect to provide the Merchandise Department with enough information on which to make logical decisions. This necessitates either phone calls or additional wires in an effort to develop complete information. This additional correspondence means increased filing and typing.

increased analytical time, delayed processing resulting in possible loss of orders.

The Gypsum Merchandise Department receives, on the average, between twenty and forty teletyped requests to meet competitive situations daily. The department sends between twenty and forty replies each day. The increased manpower needed to administer the requests to meet competitive prices is seriously cutting into the time that should be allocated to other marketing responsibilities. If the demand continues at the rate it has, (and we have no reason to believe it will not), additional personnel must be added to handle the load.

• • • • •

[11,785] • • •

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Q. What other product lines besides gypsum did your Sales Administration Department have responsibility for?

A. Well, it was all of the so-called general line items. Our insulation board line, roof insulation. Roofing on the West Coast. Mineral wool. Expansion joint. I think that pretty well covers it.

Q. And what other responsibilities did your department have in addition to the administrative processing of Form 350s and 360s?

A. Well, there was a publication of price lists, complaint adjustments, which was quite an extensive business. Then the recording of the 350 documents to the basic files thereon. Aside from that I still had the personal responsibility [11,786] I had had previously as Assistant to the Vice-President of Sales.

• • • • •

[11,789] • • •

Q. Did you have authority to grant 350 requests with respect to gypsum board?

A. Technically, I had the authority. Actually, I only [11,790] did if it was a routine item or if Miller and his assistant happened to be out of town and it was an emergency.

Q. And this was pursuant to the arrangement you had made with Mr. Buckland and Mr. Miller, that he would retain that authority?

A. That is correct.

Q. Were the form 350's and 360's kept in files by the sales administration department?

A. Yes. We kept the basic files for the system.

Q. Were your files separated by product line?

A. By product line and by sales districts or divisions within—each of the section heads maintained their own files.

Q. What kinds of documents were kept in these 350 and 360 files in your department, pertaining to gypsum board?

A. Well, they were the original of the 350, the response, any correspondence or notes pertaining thereto.

Q. And were the 350 and 360 forms which were rejected retained in the files in your department?

A. Yes, sir.

Q. You said you ceased being head of the sales administration department in June of 1969. What happened to your department's 350 and 360 files at that time?

A. Well, they were turned over to a new department called—it was marketing services, headed up by Mr. Peres.

[11,791] The files still sat in the same place, but he took them over.

Q. Did he also take over the subordinate personnel of your department?

A. He took over most of the personnel from the sales administration, all those who handled the pricing; the complaint clerk stayed with me.

Q. Excuse me. Did you continue to work closely with Mr. Peres in his department until your retirement in June of '71?

A. Yes, sir, worked quite closely.

Q. To your knowledge, was there any change in the method of keeping the form 350 and 360 files pertaining to gypsum board after Mr. Peres and his department took over from the sales administration department?

A. No. They were still maintained in the same way. I think the files on one product line, insulation board, I think, went back to the insulation board department, and there was one clerk. The same basic operation was maintained.

Q. Have you reviewed these files of form 350's and form 360's and related papers, at my request?

A. Yes, sir.

Q. What period of time was covered by the files you reviewed?

A. 1965 to 1973.

[11,792] Q. Did these files include those forms bearing differing descriptions, as identified by Mr. Thompson, such as the form 332 and the form 350–T?

A. That is correct; yes, sir.

Q. And you consider those as form 350's, do you?

A. Yes. We used 350 as sort of a generic term for price authorization forms.

Q. And does that sometimes include your 360 form, when you use that reference?

A. That is correct.

Q. Do these files include any form 350's or 360's for Big Horn Gypsum Company, before it was dissolved on August 31, 1972?

A. No, sir.

Q. Did your sales administration department ever have any pricing responsibility of any kind with reference to Big Horn?

A. No, we did not.

* * * * * *

[12,025].

RICHARD M. CYERT

DIRECT EXAMINATION

By Mr. DeLone:

Q. Would you state your full name, sir?

A. Richard M. Cyert.

Q. Where do you live, Mr. Cyert?

A. 35 Chapel Ridge Road, Pittsburgh, Pennsylvania, 15238.

Q. And what is your occupation?

A. I am a professor of economics and industrial administration at Carnegie-Mellon University and the president of Carnegie-Mellon University.

The Court. I was interested in your priority, sir.

By Mr. DeLone:

Q. Would you, Dr. Cyert, sketch for us your professional

training and background? Educational training, first, and then professional experience.

A. Yes. Yes. I have a bachelor's degree in economics and mathematics from the University of Minnesota and a Ph. D. in economics from Columbia University.

I have been on the faculty of Carnegie-Mellon University since 1948.

I received my Ph. D. in 1951, and I have worked in the area of economics and management for my professional [12,026] career.

I went through the academic ranks and was a professor at Carnegie-Mellon University, Carnegie Institute of Technology, and then Carnegie-Mellon University.

I was head of the Department of Industrial Management.

I was Dean of the Graduate School of Industrial Administration and became president in July of 1972.

Q. The post which you hold today?

A. Yes.

Q. Did you have any teaching experience prior to your professorships at Carnegie-Mellon University?

A. Well, I taught for summers and at the University of Minnesota, and I was—I taught at City College of New York while I was going to Columbia.

Q. Are you the recipient of any honors or awards related to your work as an economist?

A. Well, I have had a Ford Foundation Faculty Research Fellowship; a Guggenheim Fellowship; I have received honorary degrees from the University of Gothenburg and the University of Leuven.

Q. Where are those institutions?

A. The University of Gothenburg in Sweden; University of Leuven in Belgium.

I have a Distinguished Scholars Medal from Hofstra University; and I think that's all.

Q. Have you been involved in any work concerning statistics, and are you a member of any organization or received any awards in that regard?

A. Yes. I have done work in statistics, in statistical sampling, and I am—I was recently made a Fellow of the American Statistical Association.

Q. Are you a member of the board of any professional associations or organizations?

A. Yes. I am a——

Q. I am going to ask you these questions, Dr. Cyert, because you may be modest about it, but I want to know what your qualifications are in this case, so I am going to press you a little on this score.

A. I am on the Board of Editors of a journal called, "Behavioral Science," and I am a member of the American Economics Association, American Statistical Association, I am a past president of the Institute of Management Sciences, and I am a member of the Econometric Society.

I'm a director of several corporations—Koppers Co., Copperweld Corp., Scholastic Magazines; and the Lord Corporation.

[12,028] By Mr. DeLone:

Q. Now, in the course of your professional career, have you written any books, articles, or publications in the general field of economics, statistics, or sampling techniques?

The Court. Mr. DeLone, Dr. Cyert has written numerous books and publications, and there is a list of them here.

Mr. DeLone. That's correct, sir.

The Court. I am going to suggest that we admit that in evidence and let the jury look at it rather than go through all those publications.

Mr. DeLone. I certainly did not plan to go through all of them. There are one or two that I wanted to advert to.

The Court. All right.

We will give you a fast three.

By Mr. DeLone:

Q. Mr. Cyert, do you have before you Defendants' Exhibit 1?

A. No, I don't.

Q. Well, I wonder—I am not sure whether we have gotten the paperwork straightened out here yet.

Do you have Defendants' Exhibit 1 before you?

A. Yes.

[12,029] Q. Is that a current resume which deals with some of the things you have just recited and also lists in some five pages lists of the various books and articles which you have authored?

A. Yes.

Q. Generally, in what field has most of your writing been in?

A. Well, I sort of—It is divided between or among economics, statistics, and management.

Q. And has some of this been books rather than just articles?

A. Yes. Yes.

Q. I notice, for instance, a number of articles on sampling techniques, one book and some articles on that.

What is that general subject about that you have written on?

A. Well, this was the—the work I did on sampling was really applied to accounting records, and it was worked on with an auditor, with some auditors and with an auditing firm, designed to try to make the samples that auditors selected be based on scientific considerations as developed in statistical sampling theory as opposed to completely judgmental samplings, which was the case in most situations of auditing.

Q. Now, a number of the items referred to, a book [12,030] which you co-authored, and a number of the other items on this list, refer to theory of the firm or behavioral theory of the firm.

I am just summarizing them in a general way.

What does that deal with, Dr. Cyert?

A. Well, the firm is an area of economics, an economic theory.

And, the behavioral theory of the firm was an attempt at an interdisciplinary study with another person, who was an expert in organizational theory, to try to really make the theory have a better base in empirical work.

And, specifically we studied decision-making behavior in firms, and attempted to develop models that could be put on a computer to simulate this behavior, and to test these models in that fashion.

Q. I am not sure I understand.

You said something about the theory and empirical work?

A. Yes.

Q. Would you explain what you mean?

A. Have a better basis in what actually goes on in the world.

Q. That's what you mean by "empirical?"
A. Right.

[12,031] Q. More related to reality?
A. That's right.
Q. Not just theoretical?
A. Right.
Q. And you mentioned just then something about computers have, some of your writings involved the use of computer data by business firms.
A. Well, more specifically what we did was to utilize the computer fairly early in the development of the computers to develop what we refer to as models of the firm, where we would really construct a firm and program the computer to operate like that firm, and then manipulate certain other variables in this model.
This is called simulation.
Q. You keep referring to the "firm." Is that sort of an economists word of art? What do you mean by that?
A. Well, by the "firm," we really mean the business firm, the corporation.
This is the unit that I have worked with most of the time. The firm and the markets in which the firm operates.
Q. And have your studies and your publications covered the area of competition among firms?
A. Yes.
Q. Pricing?

[12,032] A. Yes.
Q. Price trends and the like?
A. Yes.
Some of the simulation models that we developed in behavioral theory, the firms were based on a study of price—of the actual setting of prices in some firms.
Mr. DeLone. I don't believe I did offer in evidence Defendants' Exhibit 1.
I do offer it in evidence.
I would like the jury to have an opportunity to see the full scope of Dr. Cyert's writings rather than to labor that there or to read it here in extenso.
Mr. Thorson. I have no objection.
The Court. All right, it is admitted. That's DJX 1.

[Defendants' Joint Exhibit No. 1 as received in evidence.]

By Mr. DeLone:

Q. Dr. Cyert, were you requested by United States Gypsum Company, National Gypsum Company, Georgia-Pacific Company, and Celotex Company, the four corporate defendants in this case, to study data pertaining to the gypsum wallboard industry in order to arrive at a judgment whether on the [12,033] basis of the economic evidence there was any collusion or price fixing among these firms with reference to gypsum wallboard or gypsum machine board products during the years 1969 to 1973?
A. Yes, I was.
Q. When approximately—if you recall—did you receive this assignment?
A. It was sometime in July of 1974.

* * * * * * *

[12,035] * * *
Q. Now, what was the process which followed in your effort to determine from external behavior, as I understood you to say, whether there was any collusion in this period 1969 to 1973?
A. Well, the approach that was taken by myself—first, let me just say that I made it clear at that time that I could undertake a study of this only with the aid of some of my colleagues. And they were also introduced to the counsel and did agree to go ahead and work on this [12,036] with me. And these are particularly Professor Robert Kaplan from the Graduate School of Industrial Administration of Carnegie-Mellon University, and Professor Lester Lave who is head of the Economics Department at Carnegie-Mellon University.
Q. And did both of these men assist you in the study that you undertook?
A. Yes, they did.
Q. And what is the particular expertise or area of expertise of these two gentlemen, Professor Lave and Professor Kaplan?
A. Well, Professor Kaplan is an expert in a number of areas, particularly accounting and operations research which is the mathematical form of analysis of management problems.

And Professor Lave has worked in a variety of areas in economics, including a similar area at different times with myself. We have at least one joint article together in the area of the firm.

Q. Now, how did you go about deciding what you would study in order to see whether there was any external indication of collusion among these firms, collusion or conspiracy to fix prices; did you study what counsel told you to study?

A. No, we made it clear at the beginning that we [12,037] had to be completely independent, that we had to have the full cooperation in producing data although at the time I had not completely analyzed what we wanted to do. I have enough background in the area to know that we were going to make some fairly heavy demands for data on the companies.

So the way in which we proceeded was to try to determine the forms of behavior that we would expect if the firms were behaving competitively. And the approach that was taken is one that I feel is important in this area, and that is that you have to approach the problem with what I would call looking at a number of dimensions. And there may well be others that we could have looked at and didn't look at. We tried to look at all of those that we thought were important and were manageable.

But there were six characteristics that we concluded were extremely important. One of these was the whole area of transaction prices. In other words, we wanted to know what were the prices that gypsum board exchanged for in the market for each of these firms during the period that was under study. We were interested in the way in which the—in many respects this is the heart, you see, of the argument that we were using. We were interested particularly in looking at the relationship of these prices, the actual transaction prices, in relation [12,038] to the published or list prices, and we felt that we could get ourselves in a position through an analysis of that kind to be able to express an opinion as to whether or not there was collusion or competition in the market.

Q. Now, you have indicated that the transaction prices and their relation to list are the things you mentioned as what you call the heart of the argument.

A. Yes.

Q. What do you mean by that?

A. These were the areas which I felt would be most critical in making the analysis of the case.

Q. Your use of the term "argument" is that also a term which has some peculiar meaning to economists?

A. Yes, right.

Q. You have got to remember that we are not all economists in this room, Dr. Cyert.

A. O.K.

Let's say in the analysis it was the most significant piece. I was interested in whether all of these transaction prices were going to be the same, whether there was going to be variation in term, how they related, how these prices related to each other, how much dispersion there was, elements of this kind we wanted to look at.

Q. Well, now, how did you go about looking at them?

[12,039] A. Well, we requested data from the firms for transactions prices, and the first problem that we recognized was the fact that it was going to be extremely difficult for us for five years to get every transaction in which gypsum wallboard was involved. We recognized that there were far too many transactions for us. We also recognized that gypsum wallboard is sold, as most products are, in markets which might be viewed as local markets; that is, they were in specific regions or areas. And so we felt immediately that what we had to do was to get some sort of a sample of the data.

And after a great deal of thought and experimentation among ourselves, we decided to divide the country into the nine census regions—the Census Bureau has nine regions which include the whole United States—and then to work with what are called SMSA's, standard metropolitan statistical areas. This is just a form. The SMSA is a form, a term, that is used by the Census Bureau. It is used in many areas of the Government. And, for example, the Pittsburgh SMSA includes four counties. I will see if I can remember them all. Allegheny, Beaver, Westmoreland and Washington County. That would be the SMSA for Pittsburgh.

[12,040] By Mr. DeLone:

Q. Now do I understand you correctly, the 9 regions of the country are 9 regions that are census regions? You didn't dream up some particular 9 regions, but there is——

A. No, sir, these are the census' way of dividing the country. These are standard regions that are available to anybody.

Q. And these SMSA's or Standard Metropolitan Statistical Areas are not something that you determine, but again, are census divisions of particular smaller parts of the country?

A. Right.

Q. Is that right?

A. Right.

There are, I believe, approximately 200 SMSA's.

And the way in which we proceeded was as follows:

We first said that if there was going to be collusion in this—in this industry, that it should show up in the large areas of the country.

And we were taking as an area, an SMSA. So we took the 33 we defined as large SMSA's which would be an SMSA with a population of one million or greater. And there are 33 such SMSA's.

Q. Is Pittsburgh such an area?

[12,041] A. Yes, I believe it is the eighth largest SMSA.

We then wanted a sample of these which would—of these SMSA's, of the 33, so the 33 really became what the statistics would call a population.

This was the group that we were going to work with.

And we wanted to get representations of an SMSA in each of the nine census regions, if we could. The restrictions being that some of them might not have one of the large SMSA's.

We also wanted to take Pittsburgh as the SMSA in its census region, primarily because of the fact that we were here, the trial was going to be here and that we thought if things came up in the data that we might need to investigate, it would be easier to look at them in this area.

Nothing like that did come up, but we still feel it was—I still feel it was the right thing to do.

There were two regions in which there were—there was only one large SMSA.

Q. Which were they?

A. They were Boston and Denver.

Q. If I understand you correctly, then Boston, as long as you were limiting as or long as you were going to look at large SMSA's, there was only one in the region that [12,042] Boston is located and one in the region Denver is located and Pittsburgh is a large——

A. Right.

Q. [Continuing]. SMSA within its region?

A. Right. There was one SMSA or one census region in which there was no large SMSA.

So if you are with me, we start with nine and Pittsburgh, Denver and Boston, that leaves six.

There is one with no large SMSA, so that leaves five census regions.

And what we did then, we take—we write down each of the SMSA's in each of the remaining five regions.

[12,043] By Mr. DeLone:

Q. Each of the SMSA's, or each of the large SMSA's?

A. Each of the large SMSA's.

Q. Which total how many throughout the country?

A. 33.

Q. 33.

A. So in one of the regions there might be five SMSA's. Another there might be eight.

We then decided a process, using random numbers, to make sure the objectivity of the selection, to select the remaining five of these SMSA's. So we were—so there were a total then of eight SMSA's, all of a million or greater, that were selected in this fashion.

Q. Now there has been testimony here earlier from three witnesses—I don't know if you were in the courtroom—each of them testifying about certain statistics they had developed, transactions data in Pittsburgh, Denver, Boston, and then five other SMSA's, New Orleans, Anaheim—where is Anaheim, incidentally?

A. California.

Q. Cincinnati, Minneapolis and Tampa, are those the other five?

Q. That were included in this sample which you designed?

A. Yes.

[12,044] A. Right.

Q. Did you confer with the companies? Did they have anything to do with picking of these SMSA's that would be embraced in your study?

A. No, they did not. That was one of the reason I—we used—we used a procedure which anyone can check on by utilizing random numbers.

Q. Now what period of time did you study in this effort to view what was happening in the markets where gypsum wallboard is sold?

A. Well, that was the second—second problem that we had. Having gotten the problem down to eight SMSA's which we thought we could manage and analyze, we then began to look at how much for five-year periods in each of these SMSA's, how much data we wanted, and we decided that we wanted the transaction prices for all of 1969 in each of the eight SMSA's.

Now this was because 1969 was the beginning of this period. We felt that if there was a conspiracy during this period, it should show up in that period. It was the beginning of the whole period, and that for these reasons we just thought it would be a good thing to take the whole period.

So we got transaction data for the whole year, transaction prices for the whole year for the companies [12,045] involved. We asked for that for each of the eight SMSA's for the remaining four.

Q. Now did you——

A. Yes.

Q. Were you able to get full data from each of the four companies fo rthe year 1969 on their transactions in each of these eight SMSA's, do you remember?

A. No. We were not able to do that. National Gypsum had some period missing in the—in, I believe, the Pittsburgh area in 1969.

Here and there there were a few minor problems, but I think that was the major problem that we had there, was with the three months that were missing. I believe it was three months for National.

• • • • •

[12,057] Q. Now, the data you were getting from the companies for these various SMSA's from 1969 to 1973, which is reflected in the exhibits that have just been received into [12,058] evidence, your data sheets about them concern what product or products, Dr. Cyert?

A. They were all for half-inch wallboard, gypsum wallboard.

Q. Why half-inch gypsum wallboard?

A. Well, it was our understanding, on talking with the lawyers in particular, and in a little—in—in—in looking at the, at the industry, that this was the major product of it, of the industry, half-inch wallboard.

Q. Now, on examination of this data from 1969 through 1973, what did you find?

A. We found that the prices were extremely widely dispersed.

Q. When you say "the prices," I want to know what prices you are talking about?

A. We are talking about the transaction prices in each of the areas that we examined.

Q. By "transaction price," you mean the price at which the goods actually sold and the market you studied?

A. The price at which the goods actually passed from the company to the customer.

Q. Very well.

A. Where, if you looked at them on a daily basis, there was a wide range of prices among the companies and within one company for which this product exchanged in the [12,059] marketplace.

When you went across days, looked at this on a —in any kind of fashion, summary fashion, there were a—there was a picture of what I would call rampant price competition.

In other words, these firms, on the basis of these data, were competing extremely vigorously.

Now, this was particularly true in '69, '70 and '71, up until August when price controls went on. Even after that period there was a significant amount of dispersion. And by that, I mean variance in the prices that were actually charged, that the product actually exchanged for.

The picture, I think, is one really that—well, let me just say: In my view, I would conclude from that study alone that there was not collusion in this market.

• • • • •

[12,068] Q. Dr. Cyert, toward the end of the afternoon, yesterday, after you had explained the data you get from each of the companies concerning transactions in the various SMSA's, as indicated by Defendants' Joint Exhibit 2–A, you described

the conclusion which you had reached from examining the data, to the effect that, during the period you studied, and particularly 1969 to mid-1971, there was rampant competition, and, during the entire period, from your standpoint as an economist, no evidence of collusion or price fixing conspiracy.

Now, that was based, as I understand it, on the data that you studied that had been received from the four firms.

A. Yes.

[12,069] Q. And there has already been offered in evidence the data sheets, a series of data sheets, one or two of which I showed you yesterday.

Those data sheets, as I understand it—am I correct that they are the way you and those working with you took off the information from the material that had been provided to you by the four firms from the data that had been provided by the four firms?

A. Yes. Those were the ways that Bob Kaplan and Lester Lave and I designed the form, and those forms were the ones that were used by the people that were working for us.

Q. And did you review the summaries—did you, personally, review the summaries of the data that were so taken off of the information provided by the companies, in order that you could look at—third by third or quarter by quarter, dependent on what year you were looking at—the data as to transaction prices and as to discounts off list price, for each of the periods?

A. Yes, I did.

• • • • •

[12,070] Q. Now, the summary sheets, then, which you prepared and studied, were based upon the print-outs and data supplied to you by the four firms?

A. Yes.

Q. And with those to work from, have you undertaken to have prepared certain charts which are representative of the data which you studied with reference to transactions of each of the firms in each of the SMSA's over the period studied?

A. Yes, for the transaction prices and for the discounts, and, as you can see, there are a large number of charts that would be—that would be possible to show.

We did not think that that was feasible within the confines of the courtroom, so that we have selected a number which have

been based, in our view, on being representative of the data from the study that we made.

• • • • •

[12,087]

By Mr. DeLone:

Q. Now, Dr. Cyert, I am quite sure you can't see this 16–A or the 18–A, but I think if you would explain D–12–A to us, it will be possible for the jury to see what the other charts are. I tell you, because I can read it from here, the 12–A is Boston in 1969 for the full year.

14–A is Denver, 1969, for the full year.

16–A is Minneapolis, 1969, for the full year.

18–A is Pittsburgh, 1969, for the full year, actual prices and quantities of half-inch gypsum wallboard.

Would you make clear, by using the chart that is closest to you, how this chart was constructed and what it depicts and what its significance is to you from the standpoint of your study of transaction prices and how they bear on the conclusion you have already expressed?

A. Yes.

The Court. Now, Mr. DeLone, I want you to take one city and follow that through whatever years you are using, and a conclusory statement as to the other cities, but we are not going into depth in each of the four cities.

Mr. DeLone. That is the thrust of my question. I asked for Boston.

The Witness. Boston is the nearest.

[12,088] Mr. DeLone. He can see that.

The Witness. This summarizes the prices and quantities that I have called the transaction prices.

The prices and quantities of gypsum half-inch wallboard actually sold in the market. This is the thing that we wanted to look at to see what was happening in the marketplace.

The Boston SMSA is a particular market area.

Now, so that we received from the companies, the four companies listed there, U.S. Gypsum, National Gypsum, Georgia-Pacific and Celotex the data on the actual prices and the quan-

tities sold at each of those prices. We then cumulated the total amount sold at a particular price over the whole year.

So, for example, let's take, say, the price of $48 or $48.25. This would be a—this would be derived for each company and we would look through the whole year and see the quantities sold at that price for each year, so that each of these dots may stand for one transaction or it might stand for four, five or ten transactions. But that would be the—we would then add the total amount of board feet, thousands of board feet sold at that price and that would be the plot.

By Mr. DeLone:

[12,089] Q. Dr. Cyert, excuse me for interrupting, but you mentioned the dot. There are different colored dots. Why the different colors?

A. Each dot stands for the amount that a particular company sold at that price. So the orange dot here stands for U.S. Gypsum. The blue dot stands for National Gypsum; the green for Georgia-Pacific and the red for Celotex.

Q. So that in the case where—where several companies sold at the same price, but sold different quantities, you will have two dots on the same price line?

A. Right.

Q. If it is right to call it that.

A. Two, three or four, depending on what is sold.

So for here there is four dots. Celotex sold a small quantity at that price. That price is probably $49.75 or $49.50.

And you have a red dot showing the amount that Celotex sold, probably 5,000 square feet, and the amount that Georgia-Pacific sold, say something in the neighborhood of 20,000, and so on.

So that here would be U.S. Gypsum and here would be National Gypsum, so——

Q. So you can find out what quantity each company sold at any particular price by looking for their dot on that price line and reading up from the horizontal axis the [12,090] quantity?

A. Yes.

Now the impressive thing about this, from my standpoint, is the range of prices. And you see you can throw out the extreme ones, the extreme prices here and, let's say, suppose you threw out everything from 54 up and 40 down. You see, the tremendous range within those areas where transactions are

taking place, the variations in the quantity, variations in the prices within that marketplace at which gypsum wallboard is being sold for.

And that, from my standpoint, is an extremely important kind of variation. You get a picture of a market that is, I would say, is clearly in a high degree of competition. I would say it verges on being disorderly, in the sense that—not in any negative sense—in the sense that that is a market in which—I do not get the picture of anybody exerting any kind of discipline, of any pressure for a single uniform price and this is the basis.

This same picture was generally true of all of the, let's say this general picture was true of all of the SMSA's we studied, whether they were for the quarters, for the total years or for a third of the year. And this was one important basis for my making the statement that I believe the gypsum market showed rampant competition.

[12,091] Q. Now, just so we are sure we understand the chart, there, as I look across the horizontal axis, either at the bottom or the top, I see a squiggle right after 100.

A. Yes.

Q. And I don't know how else to describe it. I don't know what you would call it.

A. No, that is standard practice for a break in the chart. It means you go from 100 to 300. That is to call attention to it. The reason is this chart would have to be very small here in order to get things on it, or it would have to be extended way out. So we break it and there actually should be a break here, also, from zero to 30. The chart is not properly prepared from that standpoint.

If the zero were on it, the thing would look, again, I suppose more widely dispersed, but there should be a break here to show the whole price scale is not on.

[12,092] By Mr. DeLone:

Q. And the break, then—the break on the horizontal axis indicates that, in the first third of the chart, you are showing by ten—by tens of thousands of board feet; the second is by hundreds of thousands of board feet——

A. Yes.

Q. I mean the second portion of the chart; and the third portion of the chart is by thousands of thousands of board feet, if I understand it correctly.

A. Yes.

Q. And then, when you ran beyond that, for a particular price category, you indicated both in the Boston chart and the others, the thousands of board feet, by simply writing the number on the chart.

A. Right.

Q. Now, these are the four that you prepared, then, for the year 1969, and the process is the same in 14–A, 16–A, and 18–A as you have already explained to us on 12–A.

A. That is right.

Q. And, from the standpoint of your observation of the diversity of transaction prices, as indicating rampant competition, or a market in what you referred to as disarray, did you find substantially the same picture in the others which are depicted here?

A. Yes.

[12,093] Q. And in the four SMSA's which, for reasons of limitation of time and space, you have not put on the board?

A. That is correct.

Q. All right. Now, did you make similar studies—I mean make charts, also, of later periods, just representative charts of the later periods out of this large—out of the number of SMSA studies that were made in the years 1970 through 1973?

A. Yes. If you recall, the design that we had on the stand, on the easel, yesterday—we had 16 squares showing the quarters for each of the other years, and the SMSA's for which we were analyzing for each of those quarters.

Mr. DeLone. All right.

I offer in evidence D 20, D 22, D 24, and D 26, which are charts for—in the following order: Tampa, for the fourth quarter, 1970; New Orleans, for the third quarter of 1971; Anaheim, for the first quarter of 1972; and Cincinnati, for the second quarter of 1973.

The Court. It is my understanding we are going to follow through with Boston all the way.

Mr. DeLone. Sir?

The Court. I had understood you to say that you were going to follow through with Boston on other years.

[12,094] Mr. DeLone. They weren't charted in order to show the full range of eight—I can't—we haven't got a chart. We

tried to limit the charts, so all that we have done, of all the studies, are these four, and the four I have just asked—I mean of the transaction prices, because there was this varying pattern, as shown by the Latin square that Dr. Cyert put up, so he has drawn his illustrations from different SMSA's in different time periods, so we can see that they are representative throughout the period.

The Court. Mr. Thorson.

Mr. Thorson. Well, if Your Honor please, with respect to these, you know, differing markets at different time periods, I submit that it represents a hodgepodge of non-comparability, and I object on the grounds of relevance, and I submit they are meaningless.

I also object on the same grounds as to the lack of sufficient foundation proof in connection with the underlying data.

The Court. All right. We will admit them.

• • • • •

[12,095] Mr. DeLone. Will you take down those charts and put up D 20, D 22, D 24, and D 26?

I might say that all the data for all the SMSA studies has been provided, of course, and is already in evidence.

The Court. I gather that they were all prepared in the same way.

Mr. DeLone. Yes.

By Mr. DeLone:

Q. Now, these, Dr. Cyert, are—of course, you can't see them all—are for Tampa, in the fourth quarter of '70; New Orleans, in the third quarter of '71; Anaheim, in the first quarter of '72; and Cincinnati, in the second quarter of '73.

How did you select these particular quarters in each of the years as the ones which you would display, out of the eight quarters per year which were studied in the eight SMSA's?

A. Well, we tried to get one quarter from each year represented, and we took a quarter that looked representative, in the sense that it was neither the extreme in variation nor the minimum in variation, so this is an average picture of what would have been found.

Q. All right. And the process here is the same as in the charts previously explained to us, so far as what's [12,096] depicted on the chart?

A. That's right. The number, see—this is only a quarter, whereas the previous one we saw for a year, so there are fewer transactions, of course, that you are talking about, a fourth of a year.

Q. And there are also fewer—there is not the same vast quantity of prices.

A. That is correct.

Q. In other words, if you portray the prices over a year, as against over a quarter, and there is fluctuation in the prices during that time, the year will give you more plot points——

A. More variation.

Q. —or more variation than the quarters.

A. Right.

Q. But, from the standpoint of your conclusion that there was diversity of pricing and no conspiracy to fix prices, do these and the other SMSA's which you studied during the years '70 to '73 support your conclusion?

A. Yes, they do.

Q. And would you tell us, just in summary, what you found in all the SMSA's and all the thirds and quarters studied from 1969 to 1973, so far as transaction prices were concerned, so—as we can't display a limitless number of these?

A. Yes. Well, you have seen a good representative [12,097] picture of the kind of situation that is portrayed, and that we found in each of the areas.

We found a variety of prices. We found firms selling, sometimes, quantities at the same prices in this case, but, at the same time, selling—a company would be selling quantities at a variety of prices, and the picture, again, is one of competition in each of these markets.

These are the local markets. This is where the action is, in terms of selling a product, and, on the basis of our examination—on the basis of my examination of these data, I can only conclude that there is no picture of collusion, that there is a picture, on the contrary, of significant competition in each of these markets.

[12,098] By Mr. DeLone:

Q. Now, did you also chart the discounts off list as those were reported to you and recorded on the data sheets which have already been offered into evidence?

A. Yes, I did. We followed the same general kind of procedure. We asked on these transactions to have the list price for each transaction, list price that would be in effect for that transaction be recorded by the company.

Q. When you say "list price," are you talking a published list price?

A. I am talking about the published list price.

Q. Yes.

A. We want the company—We asked the companies to record the published list prices. And, this was done by U.S.G., National Gypsum, and Georgia-Pacific for each of their transactions.

Q. Not for Celotex, as you have previously indicated?

A. Correct.

Mr. DeLone. I offer in evidence Defendants' Exhibits 28, 30, 32, and 34, which are the charts of material already received in evidence on a back-up sheet basis, one of the exhibits received yesterday, or the odd numbers.

Mr. Thorson. Same objection, Your Honor.

[12,099] The Court. Tell me what they are.

Mr. DeLone. Those are the charts showing the extent of discount off list in four SMSAs, the same four that were previously displayed as to transaction prices. These show the discounts off list. In the dispersion of discounts off list four of them for the year 1969, which we can display at once and have only one chart displayed, and then four, which is one SMSA for one quarter for each of the subsequent years.

The Court. All right, go ahead.

Mr. DeLone. I am not sure that I offered the subsequent years. I might as well do it in the same offer.

D36, D38, D40, and D42.

The Court. All right. I assume you have the same objection?

Mr. Thorson. Yes, Your Honor, I do.

The Court. They are admitted.

* * * * *

[12,105] * * *

By Mr. DeLone:

Q. You had mentioned in your earlier comments that based on this study, you alluded—you investigated the period of

rampant competition as being from the beginning of 1969 through the middle of '71. And I am not quite sure how you described the remainder of the period other than you said, I think, that for the remainder of the period likewise you found no indication of conspiracy, but competition continuing to exist?

A. That is correct.

And you can see that by, for example, looking at [12.106] the '73 chart, the second quarter in '73 in Cincinnati. You still see the wide range of discounts as in '72, as in '71 and as here, and these are four quarters, four different quarters in different of these SMSA's. The picture again is of a wide dispersion of prices, of a pricing off the list price, and I think the only conclusion one can have is that these firms are competing with each other.

• • • • •

[12.109] Q. • • • Did you in the course of your consideration of transactions prices, discount prices which you have been describing for us here, also look at certain National Gypsum exhibits, National Gypsum 367, 368, 381 and 382, which are what have been described as the measles charts for Boston and Pittsburgh in 1969, both transaction prices and discount prices plotted on a daily basis?

A. Yes, I did.

Q. And do those—how do those charts bear, if at all, on the conclusion you have expressed before that there was rampant price competition in the gypsum wallboard market in '69, '70, '71?

A. Well, they reinforce the position. The picture in those areas, the measles charts, are plotted on a daily basis, and there is little question that there is just tremendous variation in prices on a daily basis. [12.110] I think that could be inferred, it would have to be inferred, from the quarterly and the yearly charts which we have already shown, but what that does, what the National Gypsum charts on a daily basis do, is just to break down some of the transactions which we have summarized.

So that, let's say, this particular one—I don't have any idea, but this is just a guess—shows that there were ten transactions. Each one of those might have been on a different day so that you would have—that would be another point, a point on each day. And, similarly, with this one because these are cumulative totals such that you would get many more points to be on a daily basis, and you would find, you do find, the firms selling at different prices on the same day, and different firms selling at different prices on the same day.

Q. And did you have available to you in the data you studied, data that was stated on a daily basis?

A. Yes.

Q. Now, over the period of all the SMSA's you studied, what, if any, was the relationship between the transaction price and the list; what did you observe as to that relationship?

A. Well, I think it is fair to say there was relatively little relationship in most of the cases. As you can see from these discounts, the list price in some sense is a [12.111] price that the firm might well hope it could get. The transactions prices represent what, in fact, the market is prepared to pay, given that there are a number of firms competing. One sees then that the market price, which is really the transactions prices that I looked at that is really the market, that the market just deviated significantly in terms of the prices that it would take in relation to these published prices.

So that the transaction prices were all significantly lower, and except for those rare minor situations where there was a price above list, those were all of the prices that we looked at. All the transactions prices, the actual market prices, were significantly less than list; that is, they varied, obviously, and some were further from list than others.

[12.112] By Mr. DeLone:

Q. In periods of times of published price change, do you observe, for instance, on the measles chart of Boston and Allegheny County what happened to the level of discounts immediately following a price increase?

A. By Allegheny County, you mean Pittsburgh SMSA?

Q. Pittsburgh SMSA.

A. Four counties?

Q. Yes.

A. There are, as I recall—there may be immediately after the price is announced on that daily basis, a tendency for the price to go up a little.

In other words, the transactions, the actual market price seems to move up with the higher list, but that generally will persist for a relatively short time and then the market forces take hold and the explanation that we have deduced for that—I don't know that we have actually tested it out on anybody—but the list prices are announced in advance, as are generally list prices—they say they are going to be effective as of a certain date—and I think there is some anticipatory buying during that period, so that when the price actually—the effective date comes along, probably the only people who are buying at that time are people who are in let's say desperate need or need the board badly, and who are prepared [12,113] to pay initially, to go closer to the list price, and then the market forces take their toll and the actual transaction prices begin to move down generally.

Q. Did you look at also, certain Georgia-Pacific exhibits, exhibits which showed the so-called pink sheet or market price as being gauged by Georgia-Pacific, as contrasted with the Georgia-Pacific published price for the period from the middle of 1968, I believe they are, to the middle of 1970, those being Georgia-Pacific Exhibits 99, 101, 102, 103 and 106?

I don't expect you to remember the numbers.

A. But I know the charts.

Q. Yes.

A. Yes.

Q. Did you look at those, as well?

A. Yes, I did.

Q. Did they reflect or deal with this relationship between list and market that you have just been describing?

A. Yes.

Q. What did they show, as you remember them, Dr. Cyert?

A. They showed essentially what I have talked—discussed here on the daily basis, and with what these charts show, they show that the market price, the transaction price is significantly—well, let me say is below [12,114] the transaction—below the published list price, sometimes by larger amounts than others.

And they sometimes show an increase in the market price with a—as the list price goes up, and then a rapid, fairly rapid decline in that price.

Generally they shown that the market price was below list and that the—in some of those cases, even the raising of the list price had no—had absolutely no effect on the transaction price.

• • • • •

Q. Now, Dr. Cyert, you have told us about your study of the actual prices in the marketplace from 1960 to 1973, and the conclusions which you drew, which you have drawn from that study of what was actually happening in the marketplace.

[12,115] From the standpoint of economic theory, what is your view as to why this shows a rampant competition, rather than collusion?

A. Well, the—with a competitive situation one of the—and where we have basically a homogenous product of this kind, there are some attempts to differentiate the product, but still, basically, I think one would call this a homogenous product.

Q. When you say a homogenous product, you mean to the purchaser there is not a great deal of difference to him whether he is buying the gypsum wallboard made by one or other of these companies?

A. Right.

Q. Half-inch wallboard is half-inch wallboard?

A. Right.

I think this is a valid characterization of the product.

The one—in a competitive situation, one would expect to find generally the kind of thing that we have found here.

In fact, I guess I would have expected, perhaps, somewhat less dispersion than we found, since there are some tendencies to drive the price toward a more uniform figure. But what we——

Q. You say—I am sorry to interrupt.

[12,116] When you say there are some tendencies——

A. In a normal competitive situation where you have a large number of firms, the economic theory would expect the market price to be the same for everybody.

In other words, that would be the situation where you had a large number of firms, where no single firm had any influence on the price. There are a whole set of standardized assumptions for a—for what is called a perfectly competitive situation.

What we are dealing with here is a competitive situation, in my view, and what we—and the reason I think that is the variety of prices that we see in the market, the discounting off list price, the picture of firms really scrambling, almost on a sale-by-sale basis to try to quote a price that is going to get that particular sale.

Now that is the picture that I get from this wide range of prices in these market areas.

[12,117] By Mr. DeLone:

Q. Well, now, you mentioned, in your last answer or two, the theory—economic theory that, where you are dealing with a homogeneous product, economic theory expects to find prices leveling out.

I don't quite remember what words you used, but I think that was the gist of it—or finding a particular level.

A. Right.

Q. So that, had you found, as you did not, that there was not this vast disparity of prices in this marketplace, would a uniformity of price have indicated to you that there was conspiracy or collusion?

A. No, it would not. I certainly would have wanted to investigate, to find out how that particular price had been reached, but, because of that particular proposition in economic theory, one cannot immediately infer that a homogeneous price—that is, a single price for a homogeneous product in a market—immediately means conspiracy.

Q. But, when you find the opposite, that is, the disparity in pricing, such as you have found, that negatives, in economic theory and your view, the existence of a price fixing conspiracy?

A. It certainly does. It certainly does, in my view, indicate that there couldn't have been any kind of attempt to [12,118] fix prices, because I don't see—I don't see any fixed prices.

Q. Now, were you satisfied, then, on the basis of the study which you have thus far described—were you satisfied to conclude your efforts on the basis of looking at transactions and discounts in the eight SMSA's throughout the five-year period you studied, or did you make further studies in addition?

A. No. I wanted to continue and look into some other areas, because, despite the fact that we, as economists, do like to refer to economics as a science—and I would argue that it is—we still

do not have the data, all of the data available so that we can make precise pronouncements on the basis of a few observations, and so my approach in these problems is to try to get a number of different measurements.

If you wouldn't hold me to this, I would like to just make the analogy with, say, the human body, where a physician is examining a person and may take a temperature and find no temperature, and may well be right, most of the time, in concluding that the person is healthy. But we far prefer to have other measurements on blood and heartbeat and so on. And this is, in a sense, what we were trying to do. I felt confident that my judgment was correct on the basis of the price and discount studies, but I wanted to [12,119] go further, to see what other kinds of measurements that we might—that would make sense to us in terms of testing for competition.

Q. In effect, to check the conclusion you had reached to see if it was supported or not inconsistent with other checks that you were able or could make; is that correct?

A. Exactly.

The Court. Now, before we go into those, we will take a 10-minute recess.

Mr. DeLone. Thank you.

[A brief recess was taken.]

Mr. DeLone. Shall I proceed, sir?

The Court. Please.

By Mr. DeLone:

Q. Dr. Cyert, before we recessed, you indicated that you had performed certain other—or studied certain other economic data to check or confirm your—the conclusion you have expressed with reference to the rampant competition which you found in the marketplace.

Was one of the things you have looked at the sales made by the firms or some of the firms, that is, the four we have been considering, in various SMSA's in the country? I mean the percentage, the quantity of their sales, in SMSA—by SMSA?

A. Yes, I did.

[12,120] Q. Would you describe what it is you did and why you did it?

A. Well, we took data for 50 SMSA's and attempted to look at the sales that each of the firms had made in that particular

SMSA, and then tried to see whether that firm was increasing its sales, say, at a greater rate than the other firms, or what firms were increasing at what rate.

We wanted to compare these rates of increase or decrease for a couple of reasons. One, we were interested in seeing whether the competition that we had seen in the price area, in the discount area, how that was translating over into sales. In other words, was there the same kind of competition, were the effects of these price changes showing up in different rates of change of the actual sales of the firms?

We did not have enough data to compute in any meaningful way market shares in each of these SMSA's, so that this was the closest thing to the market share; namely, what was the rate of change in the market penetration for each of these firms?

A. Now, when you say you did not have enough data to compute the market shares in each of these SMSA's, why was that?

Q. Well, there are other firms in the industry, other than the ones that are represented at this trial, and we did not have that data by SMSA.

[12.121] By Mr. DeLone:

Q. And did you have the data by SMSA for Georgia-Pacific?

A. No. It turned out that Georgia-Pacific kept their market share or their sales on a different basis than SMSA, and they could not get the data. They tried very hard to bring it down to the SMSA basis, but they were not able to get it in that form.

Q. And did you have it for the years '69 through '73 for Celotex?

A. No, we did not. We did not have the '69 or '70 data for Celotex.

Q. Now you said 50 SMSA's. Which 50 SMSA's did you collect?

A. We took it for the 50 largest.

Q. 50 largest? And was this for gypsum board machine products, or half-inch wallboard, or what, that you studied sales?

A. This was for all gypsum board products.

Q. And why did you study the 50 largest SMSA's?

A. Well, that was going a further step in finding out, I think, and examining what was happening to a larger area of the country than we had studied with just the 33. We wanted—since we had the data—to really see what was going on in a wide range of these SMSA's, or a [12.122] wider range than we had studied originally.

Q. Now, there have been already offered in evidence National Gypsum Exhibits 502, Celotex Exhibits 22 and 22–A, and United States Gypsum Exhibit 1101, which contained data for National Gypsum and Celotex concerning their sales of gypsum board machine products from 1969 to 1973, and the 50 largest SMSA's. And, Celotex 22 and 22–A, which contains the data for gypsum board machine products from, I believe, 1971 to 1973.

Did you review the data provided by each of these companies?

A. Yes, we did.

Mr. DeLone. Apparently I said—and if I did, I misspoke—Celotex when I mean to refer to USG.

USG Exhibit 1101 is the USG data for the five years for the 50 SMSA's, and the Celotex data is on Celotex 22 and 22–A.

By Mr. DeLone:

Q. But you looked at, as I understand it, the data concerning all 50 SMSA's——

A. Yes.

Q. ——as it had been provided to you by the companies in the exhibits. You don't know the numbers, but I have indicated them.

[12.123] A. Yes.

Q. Right. And then did you endeavor to chart, to tabulate and chart—as you have done with previous data—the data for certain representative SMSA's?

A. We did. But you said "as we did before." It was clearly a different kind of calculation and a different chart, but we did chart it.

Q. Yes. But I mean, you got the information from the companies, and then did you take it off——

A. We analyzed it.

Q. And did you put it on the data sheets of your own? And I call your attention to the even numbers from 46, Defendants Exhibit 46 through 60.

A. Yes, that's correct.

Q. Those are the tables—That is, the even numbers in that series are the tables that you developed from the information provided by National Gypsum, Celotex, and USG.

Maybe you better look at one of them so we are sure that I have the right number here when I suggest it to you. Look at 46. It is the first.

A. That's what I am looking at here. (Witness examining document.)

That's right.

Q. And did you from those tables, which are the [12,124] even numbers, Defendants 46 through 60, did you chart what is shown on those tables in the odd numbers, 47 through 61, Defendants Exhibits 47 through 61? I don't know whether you have copies of those charts there or not.

A. No, I do not.

[12,125] By Mr. DeLone:

Q. Well, did you make a corresponding chart for each table?

A. Yes, we did.

Mr. DeLone. I believe I have the numbers correctly.

I offer in evidence Defendants' Exhibits 46 through 61.

Mr. Thorson. Your Honor, may I have a moment to consult?

[Discussion held off the record.]

Mr. Thorson. If Your Honor please, we object to these documents on the grounds of relevance and materiality.

There are no charges in the indictment that the defendant corporations and individuals agreed upon market shares or quotas. And, as I understand it, these pertain to market shares and possible quota issues. We don't think they relate to any of the issues on trial.

The Court. Do you want to——

Mr. DeLone. Well, if the Court please, the witness has already testified that this is one of the ways he checked his conclusion that there was rampant competition, no price fixing, and shifts in sales within local markets, as one of the ways you would expect to [12,126] determine whether or not there was price fixing or competition.

And so that this is one of the checks that the expert regarded as significant in an economic matter.

The Court. Dr. Cyert——

The Witness. Yes.

The Court. Is it your testimony that by measuring shifts in share of the market you can determine from that whether or not there was price fixing?

The Witness. Well, it was an additional piece of evidence as to whether there was competition.

In other words, I want to see whether everything stayed the same or not.

The Court. As to all these charts that you put up, have you yourself, or has anybody else to your knowledge, ever made a similar study where there was price fixing?

In other words, what are you comparing it to?

The Witness. Well, these particular ones are based on the kind of—They are not a comparison with some other specific study.

The Court. Have you at any time personally, or has somebody else, made a study, a similar kind of study where there was price fixing? I want to see what your basis for comparison is.

[12,127] The Witness. Comparison is?

Well, it is basically going from the theory.

The Court. Purely theory? There is no basis? You have no basis for comparison as to any of the—as a basis for any of your conclusions then?

The Witness. Well, there is some empirical basis, or some comparison basis that I will later on, yes.

The Court. Well, I am going to admit these charts. Let the jury decide whether, in view of all this, they do demonstrate anything concerning price fixing.

But that's for the jury.

But I want the jury to bear in mind, as you listen, that this is based on theory and not on any comparison with another situation where there was actual price fixing.

By Mr. DeLone:

Q. Dr. Cyert, with reference now to these market studies of 50 SMSAs so far as how much each firm was selling, did you, as an economist, regard this as a significant or useful study, on the conclusion you reached from the study of the pricing and discounts from list which you have already described?

A. Yes, I did.

* * * * *

[12,129] Q. Now, the SMSA's, where you looked at sales by companies, in the particular SMSA, are SMSA's which were also in the transaction study; are they not, Dr. Cyert?

A. That is correct.

Q. But you have looked at the data for 50, even though you have charted only eight, I believe.

A. Yes.

Q. And the four which we have before us are Defendants' Exhibits 47–A, for Anaheim, during the five-year period, '69 to '73; 49–A, for Boston, covering the same five-year period; 51–A, for Cincinnati; and 53–A, for Denver.

Now, would you explain—and perhaps, since there are three lines on the second one, Exhibit 49–A—the process is the same, but perhaps that would be a better one to explain to us because it has the whole set of lines on it.

A. I will stand over there. I can speak loudly.

Q. We will see if you pass the voice test, now, Dr. Cyert.

A. Okay.

[Dr. Cyert goes down before the easels.]

The WITNESS. Since there are different amounts of sales in absolute terms—here is 58,392 thousand square feet—what we did for USG, National, and Celotex, what we were interested in, was the rate of change in those [12,130] sales, so we let 1971 be a base for each one of those companies. So, in other words, this is an index. The actual number varied, so that it would be impossible to get them on one chart unless it would be so small that you couldn't see. So we let each of those be 100.

Then we compared 1972 sales with 1971, for Celotex, let us say, and that comes out to be about 70 percent. So that we put a number 70. Celotex', in other words, sales, in 1972, were 70 percent of their sales in 1971.

By Mr. DELONE:

Q. In the Boston SMSA?

A. In this SMSA.

So this gives you a point, and, similarly, here, in 1973, we took their sales and found that they are roughly 130 percent of the 1971 sales.

Q. And when you say "their sales," you are not talking dollars, now, but thousands of square feet of wallboard?

A. Right, thousand square feet.

So what this shows, see, is that, within this area, during this period of time, these companies are selling different amounts, that they are moving in different directions in terms of their sales.

For example, here, you can see that U.S. Gypsum is increasing its sales at a much more rapid rate than National Gypsum. Here, you see Celotex is going down, while National [12,131] Gypsum is going up at a faster rate than U.S. Gypsum. These are affecting the shares of the market in these areas.

Now, I mentioned the fact that I don't know of a specific case in which an exact similar chart was made, but this is the kind of material that an economist is interested in looking at in a price fixing charge, because prices are not fixed for the sake of fixing prices.

What you are interested in, ultimately, is the amount that you can sell. And to fix prices and then forget about or not care about the amount you sell is just sort of inconceivable.

So that what you are after, what a firm is after, ultimately, is sales. And this is, to me, the critical dimension, because I want to see whether there is real competition in these SMSA's as represented by the fact that their sales are varying in a widely different way, whether they are varying the same, or just exactly what is happening.

As you can see, even though you have to bear in mind that this is an index, and that even though Celotex, here, for example, is far above USG and National in absolute terms, that they are small. But it shows that they, in the Cincinnati area, have increased significantly. So that, in 1973, as compared with 1971, they would have a bigger chunk of that market.

Here you see, for example, that National Gypsum has [12,132] really taken a dive in terms of the amount that it is selling; whereas U.S. Gypsum has steadily gone up.

Now, in my mind, this is significant because I don't believe that firms will conspire to set prices and forget about what is happening to their sales. This is the reason why I wanted to look at these data.

Q. All right. Now, you took, in each instance—each of the charts start with all of the lines together at 1971, at 100 percent. Why is your index point—if that is the way to describe it—100 percent in 1971?

A. Well, because that was the first year for which we had Celotex sales.

Q. You can make the comparison for USG and National, which you had for the earlier years, by working back from this index?

A. Yes, it is just like the cost of living index, which everyone has become familiar with. You pick a particular date, say, prices in '67 to '69, and then compare them with '75 or 1960, and talk about the index. And that is what we have here, is an index.

Mr. DeLone. All right. May we see the other four charts for the other four SMSA's?

[Exhibits are placed upon the easel.]

By Mr. DeLone:

Q. Now, these are the charts, Defendants' Joint [12,133] Exhibits 55–A, for Minneapolis, for the five years: 57–A, for New Orleans, for the five years; 59–A, for Pittsburgh, for the five years; and 61–A, for Tampa.

And these, again, depict what you have already described on the four charts you showed us for the other four SMSA's; do they not?

A. Yes, they do.

Q. And, now, you examined, however, in addition to the four SMSA's that you put on the board here, you examined the data for 50 SMSA's; did you not?

A. Yes, we did.

Q. And did you find similar shifting of sales or what necessarily must follow from that market share between the companies in the SMSA's that you studied, the 50 largest SMSA's in the country?

A. Yes, we did.

• • • • •

[12,134] Q. Now, none of these studies deal with Georgia-Pacific, which, as you said, did not have the data available on an SMSA basis.

Have you, however, Dr. Cyert, examined Georgia-Pacific Exhibits 69 through 73, certain exhibits, for the years '69 through '73, depicting Georgia-Pacific's market on the basis which it had available to it from its statistics?

A. Yes, I did.

• • • • •

[12,135] Q. Did you find shifting of Georgia-Pacific's national market share?

A. Yes.

But you have to realize that on a national market once you begin to aggregate, that the shifts, because they are representing much larger amounts, the shifts will be much smaller.

Q. To illustrate that, did you aggregate the eight SMSA's which you have just depicted here market-by-market?

A. Yes.

Q. And did you chart the figures in Defendants' Exhibit 44—I mean, did you plot the figures in Defendants Exhibit 44 and chart them on Defendants' 45 for the aggregate?

A. Yes.

Q. Of these eight SMSA's?

A. Yes.

• • • • •

[12,137] Q. Did your study of the eight SMSA's and the shifts in sales—I am sorry—the 50 SMSA's and the shift in sales of the three companies which you were able to study, confirm the conclusion you have previously expressed on the basis of the transactions and discounts study, that there was scrambling between the companies in the period you studied and rampant competition?

A. Yes. It—that—it was—these charts show a consistency in my view, with the observation of the price data, and they are all consistent with the conclusion that there was competition in the gypsum market—markets.

Q. Now, in addition to studying by the 50 SMSA's, did you make some effort to determine whether there was—whether the sales to major customers followed a pattern which was inconsistent with or consistent or inconsistent with conspiracy and consistent with competition?

A. Yes. This is, again, another dimension, as I have tried to emphasize here, in examining the gypsum markets for conspiracy.

My knowledge of economics and of the management area leads me—led me to want to examine what was happening with some of the large customers. Are these—were these—in other words, places, again, where one could see competition among

the companies for the sale of these large [12,138] customers. If the firms were getting together and setting prices, then I would have expected to see little competition for the business of these large customers. I would have expected to see National Gypsum's customer left alone by the other customers—by the other companies, and, basically, to—I wanted to examine this just to see whether the observations on the large customers—on the large customers or—or on some large customers were consistent with what I had found so far in looking at prices, discounts and market penetration.

Q. Were you provided data by the four firms with reference to their 50 largest customers for gypsum board machine products?

A. Yes.

Q. There have already been introduced into this record National 501, Georgia-Pacific 91 and 91-A, Celotex 21 and USG Exhibit 110-1102.

Now, after the firms gave you the data of their total sales of gypsum board machine products as reflected in those exhibits for the 50 largest customers, did you select certain large customers to study and to chart?

A. Yes, we went through a procedure that was roughly the following:

We took the ten largest, ten largest out of the 50 for National, and ten largest for USG and put them [12,139] in alphabetical lists and compared them to see whether there were some—whether they were the same companies there or some of the same companies.

That, I think—I forget precisely the number we got out of that comparison. I think there are three or four.

Then we made the same comparison between USG and Georgia-Pacific and we got a few more.

We did the same thing with USG or with National and Georgia-Pacific.

So, in other words, we made three pair-wise comparisons to pick out those that were similar, so that we had some that were similar between United States Gypsum and National, between United States Gypsum and Georgia-Pacific, between National and Georgia-Pacific.

And then we picked, I think, one out of the Celotex list that we saw had some relationship to the other companies.

Q. Now——

A. Yes. In other words, the procedure was an attempt—we picked the—we picked the customers. There was no interference on the part of the company or the lawyers. We picked them. We picked them roughly that way. We didn't want to deal with the 50. We wanted only a small group, and that was roughly the way we chose the ones that we got.

Q. And—excuse me.

A. There were nine in total.

Q. And do I—would it be correct, you had available to you only the data provided by the four firms who are Defendants in this case, and therefore had not the opportunity to make any comparison with other firms whose data wasn't available to you?

A. That is correct.

[12,141] By Mr. DeLone:

Q. Now, is this data that you ultimately developed for the nine, is it contained on the tables which are the even numbers, D 62 through D 78? If you will just look at 62. I hope my numbers are right, again, Dr. Cyert.

A. D 62 is a particular customer and does show the data for the four companies, sales for the four companies to that customer.

Q. In other words, you got the information in from the four companies, you had to put it together somewhere before you could chart it.

A. Right.

Q. And are the charts—well——

Mr. DeLone. I offer in evidence Defendants' Exhibits 62 through 79, which are the tables with reference to these nine customers and the charts related to them.

The Court. Do these purport to show, as to the nine customers, what they purchased from each of the different companies?

The Witness. Over time.

The Court. Over a period of time?

Mr. DeLone. That's correct, for the five-year period for gypsum board machine products, in total.

[12,142] Mr. Thorson. I object on the grounds of relevance, Your Honor, that it doesn't show anything inconsistent with a

price fixing conspiracy under the Sherman Act, which is charged in this case.

The COURT. Well, I am going to leave that to the jury.

For example, a doctor who had gone through medical school could, on the basis of theory, on the basis of his study, say that he thinks a certain man suffered a heart attack; even though he had never seen a heart attack, he could do that on the basis—on the theory of what he said.

Now, how much weight is to be given to that is for the finder of fact, and it is for that reason I am admitting these charts, and you will have to determine what validity you think they have, what you think they show, and what weight you think should be given to them.

[Defendants' Joint Exhibits Nos. 62 through 79 for identification were received in evidence.]

Mr. DELONE. May we have, then, please, the charts, which I believe are Nos. 63, 65, 67, and 69?

By Mr. DELONE:

Q. Now, you have told us what you were studying. [12,143] Dr. Cyert; and would you now just explain what the charts show with reference to the sales to particular large customers which you studied?

A. Yes. Here, again, the basis for the—for this comparison is to take the total sales, total amount that is purchased from the—by this company from these four companies, Celotex, National Gypsum, U. S. Gypsum, Georgia-Pacific; and, basically, these are data that show the percentage that was purchased from each of these companies in '69, the percentage of it that was purchased in '70 and '71, and so on. And so that one can see, then, really, the share of these purchases made by this company from the four, that each of the companies got over time.

So that, for example, let's say Georgia-Pacific and U.S. Gypsum—here, you see that, in 1969, Georgia-Pacific was getting something like probably 36 percent, 37 percent of the market—that is of these purchases. U.S. Gypsum had about 40. And then you see, here, that Georgia-Pacific is getting an increasingly larger amount. U. S. Gypsum is going down; National Gypsum is going up; and Celotex is also going down. So that Georgia-Pacific tends to be the gainer.

Now, how did they get to be the gainer? Well, one thing that we can be reasonably sure of, from looking at the price

data, is that price must have been a factor in this. [12,144] Knowing that it is a homogeneous product, we know that price has to be a factor.

Service is another element which we have not gotten into, which is also a way in which firms compete, but, knowing the price data, I would, from these, from the observations we have already made and from these observations, put a heavy emphasis on the price competition as being a factor which is leading to the kind of competition that one sees in the way in which Adobe Building Materials is buying from these four customers.

I don't think that that's an abstract, theoretical proposition. That is, in my view, an important fact, that these shifts are occurring here.

I am inferring that price is a factor. As a director of a number of companies, having gone into purchasing policies in those companies, I know that price is a factor in the way in which companies buy materials, so that I feel I am on quite solid ground in concluding or, let me say, inferring that price competition is an important factor in the kind of picture that you see here, which is one of competition for the sales of this company.

And, if you go on, you can see similar patterns in other companies that we have displayed here. These are all large customers, and the picture that one gets from this is competition, at least among—sometimes among three, sometimes [12,145] among two, sometimes among four of these customers—of these companies, for a particular customer.

Q. Now, we have seen 63–A, 65–A, 67–A, and 69–A, which concern the sales, respectively, of Adobe—to Adobe Building Materials, Livonia Building Materials, Lowes, and Lumber Distributors, Inc.

Mr. DELONE. May we now see the next five charts? I think there were nine, all told, so perhaps one could just be held up, and can see whether they show a similar shifting of the business of these major customers, over the five-year period that Dr. Cyert studied.

By Mr. DELONE:

Q. I think we understand that, from your explanation, Dr. Cyert, what the charts show but you will have to hold that up. You have got Georgia-Pacific obscured.

We are now exhibiting Defendants' Exhibits 71–A for Rinker Materials Corporation; 73–A for Roselle Building Materials; 75–A for Tiger Building Materials; 77–A for United Building Supply; and 79–A for Wickes, W-I-C-K-E-S.

A. Yes. See, I see the same pattern, essentially, that I have discussed in all of these. The least effective, in terms of this measure of competition, is this particular company, where you see a little bit here between Georgia-Pacific and USG, but, essentially, these are relatively flat. The amounts stay roughly the same, so that, in this particular [12,146] one, there was not the effective competition that I have seen, the vigorous competition that I see in these others, where you have different percentages changing, and the share of that customer changing over time.

Q. All right. Fine.

Mr. DeLone. You can take Wickes down, Mr. Kosinski, so you can come out from under.

By Mr. DeLone:

Q. Now, Dr. Cyert, have you received data concerning—well, are you familiar, first, with the fact that sales of gypsum machine board or gypsum board machine products and gypsum wallboard are effected on a zone-delivered basis; in other words, the pricing is by zone?

A. Yes.

Q. What do you—what do you understand that to mean, just so we are clear, we know what we are talking about?

A. Well, a price—a list price is published for a particular zone, and that means that a company—that—yes, a company that's selling from—product from a particular mill, if it were going to sell at that list price, would have to pay itself for some of the freight that might be involved in the sale.

In other words, the zone prices involve some freight absorption by some of the mills. The farther away the mill is from the area, the more that—the more freight it would have to absorb.

[12,147] By Mr. DeLone:

Q. Now, the evidence in this case shows that during the period from 1969 through 1973 the price zones of one of the companies, the price zones for purposes of zone-delivered prices, were changed in excess of 450 times that for another company.

Particularly during the period 1970 zones were changed frequently by United States Gypsum, in fact, to conform their zones more closely to those of Georgia-Pacific in connection with their competition with Georgia-Pacific. And, that there were frequent zone changes made by United States Gypsum.

Does the fact of frequent zone changes, changes in the zones for pricing, does that fact bear on, or influence in any way your conclusion that there was indeed rampant competition between these firms and no price fixing?

The Court. Don't answer until I hear the objection. There is an objection here, and I want to hear it before you answer.

Mr. Thorson. If Your Honor please, I object to the form of the question, which is basically this: That counsel has drawn a conclusion from evidence rather than stating it properly that there may have been evidence in the record to show that.

The Court. I sustain the objection.

By Mr. DeLone:

[12,148] Q. Well, assume that there was evidence in the record, as I have indicated, Dr. Cyert.

Then what would that—Would that have any influence on your opinion as I have just asked?

A. Well, I see it as again being consistent with the competitive pattern that we have been observing in each of these individual tests.

The reason I say that is that changes in any of the conditions under which selling takes place are—make the conspiracy somewhat more difficult in the sense that one has to get agreements again after there have been some agreements, or you have to develop some large elaborate system of indicating what is, what each of these things means.

The evidence on things like list prices is that firms in conspiracy or collusion want to keep as many things the same as possible. They want the conditions to remain the same. This is the whole process of collusion, to make the collusion effective and easier to maintain, keep the status quo.

Q. Well now, you said the evidence with reference to list prices. What do you mean? Economic evidence of some sort?

A. I have some economic evidence that has been published by another economist on what happens under [12,149] collusion to list prices.

Q. Well now, that's with reference to list prices?

A. Yes. Not the zones, with respect to list prices. It is only an example which I was bringing in to show that my point—which I am extending to zones—is consistent.

In other words, keep things the same. This is the hallmark of the collusion.

Q. Now, turning to list prices, which you say have been studied by other economists in order to determine whether or not, or what the behavior of list prices is with relation to collusion or the absence of collusion. Turning to list prices.

If you assume here—or, would you assume that there were frequent changes in list prices during the period that you studied, 1969 to 1973, frequent changes in published list prices by the defendant companies here. Assume that one of the companies on its broad divisional prices made 20 changes of published prices by its broad regions or divisions, of which there were four for the whole nation. And, that another made some 40 changes of published list price in the period from 1969 through 1973, for an average of about 7 per year.

And, that the first company was the largest seller, and the second company I have alluded to was the second largest seller.

[12,150] Assuming that degree and measure of change in published list price in the period 1969 to 1973, would that then—how would that affect your conclusion that there was rampant competition and not conspiracy?

A. Well, these changes in list price are consistent again with my finding of competition in the markets here.

Another economist by the name of George Stigler published an article that I believe goes back to 1947 in the Journal of Political Economy in which he was looking at the whole problem of price flexibility or rigidity; and in the process showed that in cases of collusion—and he mentioned a number of industries, starting with rayon producers.

There was a collusion between rayon producers starting sometime in October of 1931, extending to May of 1932. The specific reference of this one is in the Federal Trade Commission decisions for—I think it is Volume 25 for 1929—for 1939.

In that period Stigler showed that for that industry—Stigler showed that in the period of the same length as the conspiracy preceding the conspiracy, there were no changes in list prices.

During the period of conspiracy there were no changes. In the subsequent period there were, I believe, something like 4 to 7 changes.

[12,151] Q. You mean after the conspiracy was terminated?

A. Right. There are similar kinds of data for copper producers.

The only periods, for instance, in copper of prolonged rigidity in prices occurred under two legal cartels.

One was when the copper producers were formed into cartels under the Webb-Pomerene Law, which is a law authorizing firms to ban together for export purposes.

During that period copper prices—these are list prices—were rigid. And also under the NRA, which was another period in which firms were legally being organized into cartels.

There is data for pineapple producers in August of 1932. The leading pineapple producers entered into a 10-year agreement to restrict price and output. And in the 39 months preceding that conspiracy there were a large number of price changes. I think something on the order of 17 in the 39 months.

In the 39 months after that agreement there were something like 6 or 8 changes.

There is data for typewriter producers during a period when they were colluding, which indicates little change in list prices.

There is data in the midwest—There was a midwest oil pool case, Madison Oil Case, where there was a [12,152] pooling of interest.

And, Stigler has a quote from that article which says something to the effect that prices never—never before in history had prices displayed so much rigidity as during that period.

So there are some five cases. It is true that they go back in time.

One of the weaknesses of economics is the fact that there is not as much empirical data as one would like. Part of this, it is difficult to get the kind of data that I was able to get from these companies, to get from most companies.

But these are actual cases that show rigidity.

One would expect rigidity in list prices, in published list prices, when there was a collusion, when there was collusion.

And I see the kind of behavior that you have indicated to me as being consistent with a competitive situation, not a collusive one' in this industry.

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[12,153] By Mr. DeLone:

Q. Now, when we are talking about published list prices, Dr. Cyert, what significance would it be to you if it were shown that frequently in connection with numerous price changes, one company announced an increase, and thereafter other firms announced a similar increase, in some cases, and at other times announced a different increase, of what significance is that to you in——

A. Well, that is not an uncommon pattern. I would say it is not of any particular—not of any particular significance. I think what you would need to look for would be regularities. If an industry were following a pattern where the same company has announced, and the next company came in the same period in the same way and so on, what we look for in terms of trying to analyze whether there are patterns here of deviation from competition, we look for regularities of this kind. We look to see where there is a price leader in the sense that the same firm is leading in terms of price, and that everybody else immediately follows.

But the fact that the transactions prices which we have gotten show competition gives even less importance than one would put ordinarily on list prices without these transactions prices because I know what took place in the market by these transactions prices. List prices are [12,154] something that we use—Sigler, for instance, in this particular article emphasizes the fact that it is transactions prices which are critical, not list prices, which is exactly the position that I would take. And when we can get the transactions prices, then these are the critical things for us because from them we can tell what is going on in the market. And in this case I would say markets because there isn't any single market.

Q. There isn't any single market in what respect?

A. Well, in the sense that somehow there is a whole United States, and that you have a price, and that you sell—the firms sell in that one market. There are a series of markets. Let's say there isn't a single market as there would be, let's say, for the

New York Stock Exchange. That is a single market. If you want to buy something, you get a broker who has a chair on the exchange, and we know where the selling takes place there.

If you want to buy gypsum, there is a whole range of places where you can buy it.

Q. And as I understand what you are just saying, you regard the transaction data which you had, particularly that which you first described, as critical to your determination that there was competition here?

A. Absolutely. At the beginning I said that is the heart of my analysis. And that is exactly what I [12,155] would continue to maintain because that tells me what firms are selling this product for in the market.

Q. Dr. Cyert, is it of significance to you in validating or confirming, or would it be of significance to you in validating or confirming your conclusion of rampant competition, not conspiracy, to know that one of the companies, if you knew that one of the companies, Georgia-Pacific in the period 1969 through 1973 operated through some hundred or more autonomous distribution centers, or largely autonomous distribution centers, sold 80 to 90 per cent of its products through those centers, that its management engaged in a policy of producing flat-out all that their mills were capable, or attempted to produce flat-out all that their mills were capable of producing, and if it were the fact and you knew it that USG, the largest company in the business, which had been primarily dealer oriented before Georgia-Pacific's entry then split up into four divisions dividing the country into four divisions and separate profit centers with considerable autonomy in each during the period '69 to '73, and that during the period of '70 to '73 USG set up the L & W Supply Corporation with branches throughout the United States particularly geared at making sales from the local branches to drywall applicators so that by 1973 approximately 18 per cent of USG's business was sales [12,156] to his wholly owned subsidiary which was in turn selling at the local level, and if you knew that National Gypsum Company, the second—if you knew that it was the second largest seller of gypsum wallboard and gypsum board machine products, that it continued, in the period you have studied, to use essentially the pattern of distribution through its dealers, but as GP developed

its distribution centers, National Gypsum set up certain supply centers for local delivery and trained its dealers to compete with new Georgia-Pacific methods, if you knew all those facts and if they were the facts, what bearing would that have on your conclusion that there was rampant competition, not conspiracy, here?

A. What you are saying is that there are three different methods of marketing and distributing the product among the three firms; if there were, what relevance does this have?

I think again it shows it is consistent with what I would expect to find from the rest of this industry, from what I have examined—the other dimensions of this industry that I have examined. In other words, there is here even competition in trying to develop new methods of distribution. This is the kind of behavior one expects in an industry in which the firms are competing. So one would expect to find experiments with organizational structure. I would predict that there would be changes [12,157] in the way in which—in the location of the pricing decisions. You didn't mention this, but I would wager that there are some differences and some changes during the period as to where the price decision was made. I would think given the kind of pattern of competition that we have seen, the fact that firms should be concerned about amounts that they are selling in different places, that you would want to—that these firms would be trying a number of things to change the amounts that they are selling. They not only would be competing price-wise, in my view, as we have seen but in other ways including management decision-making areas, decision-making techniques as well as marketing.

So the answer is I would expect the kind of information you have given me to be consistent with what I have already observed, namely that there was very strong competition in these markets.

[12,158] By Mr. DeLone:

Q. Now, in all the tests which you made, were all the tests and observations which you made of this industry supportive of the conclusion that the industry was in the years you studied highly competitive and not engaged in a price fixing conspiracy?

A. That is—that is definitely my inference from the data I have looked at, the measurements I have made, the tests I have made, the various studies that I would come to the conclusion—I have come to the conclusion that this industry is competing and I do not believe there is any collusion here.

Q. Now, did you find that to be the case in all markets that you studied?

A. This is the inference that I would make for all of the markets that I have studied.

Q. And is that your opinion with reference to all the markets that you have studied?

A. Yes, it is.

Q. And what can you tell us about whether, if you find no conspiracy, but rampant competition in all the markets that you have studied, what can you tell us about—what is your opinion—what is your opinion about whether there could exist a nationwide conspiracy among these four companies to fix. stabilize and maintain prices of [12,159] gypsum machine board products during the years 1969 and 1973? Could such—in your opinion, could such a conspiracy exist during the years 1969, 1973, in light of what you have found in all the markets that you have studied?

A. I would interpret nationwide to mean every market. We have looked at a representative group of markets, as well as we can determine representative, and I do not find it in those markets.

It would be my definite inference from these data, my conclusion from the studies that we have made, that there could not be a nationwide conspiracy.

• • • • •

[12,162] Q. Now, Dr. Cyert, Mr. Thorson on voir dire examination asked you about a $34 price which appeared in the chart on the Boston—for the Boston SMSA.

Do you recall that?

A. I do.

Q. Have you had a chance in the recess to check with Professor Kaplan and your file on that?

A. Yes, we have.

Q. Did you find out what the situation——

A. Yes.

Q. Why that is there?

A. Yes, we did.

Q. Why is it, sir?

A. Well, it is an inconsistency on our part. I would deny it is an error, but this is a matter of definition.

What happened was when we first—when we asked [12,163] for prices from the companies, we asked for all of their transaction prices and we got these and we noticed then that these included transactions with other companies.

For example, Celotex buys and sells, in this case sells a product to Flintkote. And there was one transaction with Georgia-Pacific.

Now, in our effort to get—we will say to purify the data—we wanted to have all the data on the same basis and we felt these transactions might well be at a lower price than, say, a company would have sold to a dealer.

We then asked the company—we then indicated we didn't want to use these inter-company sales.

In the meantime, we had gotten the one from Georgia-Pacific into our records and it was—it was one that was not taken out.

The reason we wanted these out, in general, was that we thought they might actually increase the variations, the range of these prices in a—in a, perhaps, somewhat distorted manner.

In a technical sense, we should have used them, since they are transactions, but as I say, we were trying to get all the transactions on the same basis.

In any event, that is how this one came in. It was a sale to Georgia-Pacific.

[12,164] Q. It was in that $34 range?

A. Yes, it was accurate and was plotted accurately and it was just one we had not taken out.

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[12,166] • • •

CROSS-EXAMINATION

By Mr. THORSON:

Q. And how long did this study continue?

[12,167] A. Well, the study has continued—the total study has continued for some time.

We were able, I would say, to get a reasonable—I think we had reached the point where the conclusions were firm—certainly, I can't pinpoint it exactly, but I would say—I would feel that, certainly, by January or February of this year, we were certainly quite certain of the conclusions.

Q. And during that period, from July to January or February, how many total days did you and your associates put in on this project?

A. Well, I would say, probably, I would have put in something in the neighborhood of 20 hours of work, and both of my associates and people working for them would have put in a great deal more. This was sort of the way we understood that we were going to work together.

Q. And these are Professors Lave and Kaplan?

A. Kaplan; yes.

Q. And so it was on the basis of that that you reached your conclusion that you have related to us in the court here, yesterday and today?

A. Yes.

• • • • •

[12,170] Q. Did you not testify, on direct examination, that this study was pertaining to a price fixing charge alleged to [12,171] have begun in 1969? Was that your testimony?

A. My testimony was that we were asked to investigate the period from 1969 to 1973, and that there was a charge of price conspiracy during that period. I don't have any knowledge about any notion of a beginning period.

Q. Do you know, or did you know that the charge was that the price fixing conspiracy began at least as early as 1960?

A. No. I do not know that.

Q. Did you read the indictment, or were you shown the indictment at any time?

A. We—I did not personally read the indictment. One or more of my associates may have. That was not—we made it quite—we wanted to make it clear, and we did make it clear,

we were not functioning as lawyers on the case, we were functioning as economists, that we were taking on a task of analyzing market behavior for the period '69 to '73, to determine from that, from our studies—and we wanted it clear and we made it clear that we had to get the data we asked for, or we would withdraw from the case, and that that was our objective. So the indictment was not relevant to me, and I considered that the lawyers' business.

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[12,174] Q. Was there anything else besides that which you have related on direct examination that you have studied in connection with your analysis?

A. Not that I can think of, no.

Q. So I take it you did not study costs for gypsum wallboard?

A. No, we did not.

Q. Did you study shipping patterns, logistics of the industry?

A. By shipping patterns, what do you mean?

Q. The transportation. The shipping of gypsum wallboard from origin, point of manufacture to users or to customers.

A. What kind of a study are you proposing? Are you asking me whether we made—Did we—I don't understand what you are talking about. Did we study the logistics? [12,175] Are you saying, did we study how it was shipped, whether it was flown by airplane, shipped by truck, or what? Are you saying did they use linear programming to determine shipment? What are you saying? I don't understand what you are saying. I mean, you've got to be more precise.

Q. I am asking you whether you made any study of the shipping of gypsum wallboard?

A. Any study. Shipping or shipment of gypsum.

The COURT. The methods of shipping, Doctor.

The WITNESS. We did not get into that topic, put it that way.

[12,176] By Mr. THORSON:

Q. So I take it you made no study of what wallboard goes from what plant locations to what customer locations or areas?

A. No, we did not.

Q. So you did not make a study of any markets relative to the point of origin from the plants from which the product was shipped?

A. No.

What we were interested in were the markets, period.

Q. Now, you stated that you studied the cost of half-inch gypsum wallboard?

A. No, I didn't say that. I said we studied the transaction prices of half-inch wallboard, not the cost.

Q. I am sorry, I intended to say "prices."

A. Okay. Prices, yes.

Q. If I said "costs," I misspoke.

Now, did you look at the prices of any other types or sizes of gypsum wallboard in your study?

A. I did not, no.

Q. Did any of your associates?

A. I would doubt it. I think it would probably have been incidental to the work if they had.

In other words, we had huge amount of data, more [12,177] data than really we could easily deal with. And we wanted to concentrate on the major product.

We did get advice on our own question as to what the major product was in gypsum, and we were told that the half-inch gypsum was the crucial product.

Q. Did you make any study of the nature of capital investment, capital equipment in the gypsum wallboard industry?

A. No, we did not.

Q. Did you make any investigation or study of profit margins, profit levels within the industry?

A. No, we did not.

Q. Isn't it generally true that one of the first things that people would look at to determine whether there is collusion or competition in an industry is to see what prices are in relation to costs?

A. That would not and was not the way I would go with it.

Now, I don't know what you mean when you say "people."

Q. Economists.

A. No, I don't believe so. I do not know of any specific studies of that kind.

Q. As an economist, if you were to observe that prices were high relative to costs, could you be in a position [12,178] to draw any inferences one way or the other as to the existence of collusion?

A. No. No. In every industry there are different times when prices will vary with costs. If the industry is competitive, then particular things will happen. There will be expansions, new resources come into the industry. This is under a perfectly competitive model that I made reference to.

Q. And if it is collusive then a different set of circumstances may arise?

A. No. There just may be high barriers to entry, for instance, and it may be difficult for—For instance, I would not want to sit here and conclude that there is collusion in the automobile industry in years when they make money, and that they are competitive now when they are losing money.

Now that's not a—you can't make any inferences that way to amount to anything.

Q. So, would it make a difference as to whether barriers to entry were high or low?

A. It would make a difference as to what?

Q. For your analysis. If you were to study on internal data to determine whether there was a likelihood or non-likelihood of collusion in an industry.

A. No. Barriers to entry. From knowing whether the [12,179] barrier entries are high or low, one could not conclude therefore whether there is collusion or isn't collusion.

Q. Would it be a meaningful thing to consider if an economist were studying an industry on the basis of external data?

A. Depending on his objectives.

Q. If you were trying to determine whether or not there may have been collusion in an industry.

A. During a particular period?

Q. Yes, sir.

A. No. That would not be relevant to go in and say whether the barriers were high or low.

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[12,206] Q. In your study of the gypsum industry, did you become aware of the fact that there was a trade association in which the gypsum producers—including these corporate Defendants—met at regular frequent bases?

A. Well, I know there is a trade association. I do not know the other things that you are talking about.

Q. Do you know whether at these meetings they discussed business matters, affairs of interest common to each of them?

A. I don't know what was discussed. All I know is there was a trade association. I have no knowledge of who met there, what kind of conversations they had, or whether anybody met there.

Q. Do you know whether at any of these gatherings [12,207] the gypsum manufacturers discussed forthcoming price increases?

A. No. I don't know even whether the manufacturers were there. I mean, I don't know who you mean by "the manufacturers." Do you mean the presidents of the companies?

Q. Representatives from the manufacturing companies.

A. No, I don't know anything about that.

• • • • •

[12,240] Q. If there were a trough and a downturn in the gypsum wallboard business as of late 1965, and if there were an increase put into effect at that time, would you expect such an increase to take effect and hold in the marketplace?

A. Well, all I can judge by is what we have seen here from '69 to '73.

And, the answer is, "no, I would not on this basis expect it."

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[12,242] • • •

By Mr. THORSON:

Q. Now, you have testified on direct examination concerning certain observations you made with respect to price fixing conspiracies in other industries at other points of time, did you not?

A. No, not that I have observed. I indicated this was in the literature. It was a set of findings that had been reported by George J. Stigler in the Journal of Political Economy for 1947 which I was giving to the best of my recollection.

Q. And you spoke about the level of prices in what you described as the Madison Oil case, did you not?

A. Not the level of prices. I talked about the rigidity of prices.

Q. The rigidity of prices?

[12,243]

A. Right. That is a quote from George Stigler which he put in quotation marks, so I assume he was quoting it from a decision of some kind.

Q. All right.

Now, the Madison Oil case was ultimately ruled upon by the Supreme Court which stated, "Nor is it important"——

Mr. MELLOTT. I object to this, Your Honor.

The COURT. Sustained. You can't read from a decision of the court.

By Mr. THORSON:

Q. Based upon your familiarity with other price fixing cases, do you know of any situations where there were proven and established conspiracies to fix prices even though there was a wise dispersion in the actual market prices by the Defendants in those cases?

Mr. DELONE. I object to the form of that question since the witness has not testified to any familiarity with price fixing cases.

The COURT. That is what he is inquiring into.

You may answer the question.

The WITNESS. You asked me whether I have familiarity with other price fixing cases?

By Mr. THORSON:

[12,244] Q. Yes.

A. I do not, no. What I quoted from was Stigler. I have not made any sort of specialty of looking into price fixing cases.

Q. Do you have any familiarity with what is known as the electrical equipment cases back around 1960?

A. Only a newspaper and magazine reader's familiarity. I read the New Yorker series on it. I have not gone beyond that.

Q. Well, did you not write about those cases in your book?

A. I do not believe so, no.

Q. Now, Dr. Cyert, I will show you your book entitled, "The Theory of the Firm," and invite your attention to pages 250 and 251, and I will ask you whether you devoted two pages of your book to a discussion——

A. No, that was my co-author. I did not write this.

Q. And who was he?

A. Kalman J. Cohen. He is at Duke University now, if you want to get a hold of him.

Q. Did you review this part of the book?

A. No, we—you know, we were apart for a good bit of this time, and we both wrote independent sections on this. But in ony event, you know, this is still [12,245] relatively—this is an article based on a Fortune Magazine article, and that is what this is from, Fortune Magazine. It is not any great scholarly or legal article.

Do you want to phrase the question again, and I will try my best to answer it?

I am not any expert on the electrical equipment manufacturers. I have indicated that what I read has been in popular magazines. That is all. And I consider Fortune a popular magazine, although I didn't happen to write this.

Q. Do you use that book in your course work?

A. I have not used it, this particular book, and the answer is no. It is a revised edition which has just come out. The earlier edition I have taught from, and in a semester you don't go through every chapter in the book or every page in the book, but I have read this. I am not saying I have never read this page and a half. I have read it.

Q. Did you tell your students to read that?

A. I would imagine on some occasion I would assign the whole chapter without necessarily saying, "Be sure you read page 250 and 251."

Q. Would it surprise you if in the electrical conspiracy cases there were dispersions of prices between, among, the competing manufacturers of electrical equipment [12,246] that far exceeded the dispersion of prices that you have graphically displayed on your chart?

A. How are you measuring that?

Mr. DELONE. I object to that question.

By Mr. THORSON:

Q. In terms of either percentages or dollars?

A. Percentages of what?

Mr. DELONE. I object to the question as going far beyond the scope of this case. Now Mr. Thorson wants to start trying another case.

The COURT. We had comparisons by your witness, sir, along those lines, and I think this is a proper inquiry. Your witness went into various other industries and told about them, so I guess we can do this.

I have overruled the objection. You can answer the question.

Mr. MELLOTT. I object to the question as a matter of form, Your Honor. There is no proper foundation for the assumption which he has made.

The COURT. Well, I guess you can answer whether you would be surprised.

The WITNESS. As I tried to indicate, I don't know—I really don't know how to answer it without some sort of definition of what you are talking [12,247] about. First, when you are measuring dispersion, then are you talking about the fact that on bids there would be a significant dispersion of prices? What are you talking about?

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[12,264] • • •

Mr. MELLOTT. I consider this to be extremely prejudicial to the defendants. They assume facts in asking questions of this witness that have not been properly proven.

The COURT. I don't know whether they are going to do that yet. We will see.

Mr. MELLOTT. That's what he did yesterday, in the question to Dr. Cyert yesterday. He suggested that in the Electrical Equipment cases there was a wider dispersion of transaction prices than in this case. He made that statement in front of the jury. I believe that to be improper conduct, prejudicial to the defendants.

The COURT. I don't want you to make any statements in front of the jury. You ask the witness.

Mr. MELLOTT. Well, he did it yesterday, Your Honor.

Mr. THORSON. I did that in the form of a question to Dr. Cyert. But I will merely ask Dr. Cyert what dispersion is.

The COURT. All right, bring in the jury.

Mr. MCSWEENEY. Your Honor, may I say something on this? One of the problems here is the great [12,265] attendant publicity that covered the Electrical Equipment cases which emanated in Pennsylvania.

The COURT. Mr. McSweeney, I will be willing to wager with you that not one member of that jury ever heard of the Electrical Equipment case.

Mr. MCSWEENEY. That's possible. But there is a danger because—Your Honor will recall the problem that we had earlier with publicity when Your Honor had to defer the commencement of this trial.

And particularly in Pennsylvania. As Your Honor will recall, these electrical equipment criminal cases were all filed in Philadelphia, and they were given tremendous publicity throughout the country, but especially in this State.

The COURT. There may be members of the jury that don't know Philadelphia is in Pennsylvania.

Mr. DELONE. They know Westinghouse Corporation, who is one of the major defendants there.

Mr. MCSWEENEY. Westinghouse is prominently in them. One of the jurors is an electrical engineer.

The COURT. You see, you determine, you decide to use expert testimony on this subject——

Mr. MCSWEENEY. Yes, we did.

The COURT. ——and the Government is entitled now to cross-examine on that basis. So, see if [12,266] there is any comparison with a situation where there was price fixing.

Mr. MCSWEENEY. Well, Your Honor, may I point out that just the first chart—not that I want to become a witness in the case——

The COURT. Well, you have an alternative. I will strike the testimony if you want it. You can't have it all your way, you know.

Mr. MCSWEENEY. No. No, we don't expect that, Your Honor.

But, Your Honor will recall the Electrical Equipment cases. In the criminal cases there is not one tried, they are all pleas. There was not one Government civil case tried.

The Circuit Breaker case, which he is referring to here, which was pending at that time in Chicago, Illinois, before Judge Robson, was a damage case which also was not tried. It was settled. So, all this first chart is what some plantiff's lawyer put in his brief.

The COURT. Yes. But I, too, was concerned with testimony based purely on theory on dispersal of prices. That concerned me when there was nothing to compare it with.

I was also concerned with the fact that it started in 1969 and went through 1973, I believe. Because, if it [12,267] had started in 1960 the dispersal might have been much broader, and it might down to 1969 and been narrower than it was in 1960. We don't have any of that.

So, I am just not sure, and I think that the Government has a right to cross-examine on this subject, and I am going to let them do it.

• • • • •

[12,272] Q. Dr. Cyert, in your work as an economist, do you, in gathering your knowledge of empirical activities from various industries, or businesses, and behavioral transactions, do you rely upon the work of other scholars and experts in the field of economics and industrial organization?

A. Occasionally. Not for empirical work. That I would do myself.

Q. Now, you referred to Professor Stigler yesterday and alluded to certain empirical facts that he related in his 1947 work, did you not?

A. Yes.

Q. And that is the type of scholarly work within the economic community that you rely on from time to time?

A. Yes, published in a respectable journal. And he is a well-known and respected economist.

Q. And it was from reading the words of that economist that you learned of facts concerning the rayon industry or the gasoline industry in the Midwest referred to as the Madison Oil case by you, was it not?

A. Yes.

Q. And is it not generally true that your knowledge [12,273] of empirical activities, the real life activities, in most situations comes from the reports and the works of other observers and scholars?

A. In the cases that I have engaged in empirical work, it has been work that I have done, and that I have not generally utilized somebody else's observations.

And, secondly, there aren't that many in the literature.

Q. Now, do any of the works that you rely on, are they written by professors who are on the staff of major universities in the country?

A. They could be on staffs of major universities, or in industry, or unemployed. The source is not particularly relevant. Their point of employment is not relevant to me.

Q. Well, would not the fact that a person was on the faculty of a major, well-known university be important to you?

A. No.

Q. It would not?

A. No.

Q. Did you ever rely upon or read or study the works and writings of members of the faculty at Harvard University?

A. Which faculty?

[12,274] Q. Well, economists.

A. The Department of Economics?

Q. Economists on the faculty at Harvard University.

A. Well, the economists in the Department of Economics I would put some faith in. The economists in the business school, very little faith in.

Q. This is the Harvard Business School?

A. The Harvard Business School. They do very little research there, and they are just not—they just don't have top people. Harvard University will not even allow them to issue a Ph. D. They have to issue a DBA, Doctor of Business Administration. They don't let them issue the Ph. D's because they don't think their scholarly criteria are up to the criteria of the scholarly community.

Q. How about the economist, chief economist, for the Royal Bank of Canada. Would you regard that as—

A. I don't know anyone who is chief economist for the Royal Bank of Canada.

Q. Do you know an economist named Ralph Sultan?

A. No, I never heard of him until you gave me this book.

Q. Are you familiar with any studies by economists of the pricing behavior in the electrical equipment conspiracy cases?

A. Not that I can think of at the moment.

[12,275] Q. Have you ever had occasion to make observations of the pricing behavior involved in the electrical equipment conspiracy cases?

A. No, I have not.

Mr. MELLOTT. If the Court please, I would request——

The COURT. Wait a minute. I have to get something worked out here.

Mr. MELLOTT. Well, counsel is speaking loud enough for me to hear it at this point, and——

[Conference at the bench between the Court and his law clerk.]

The COURT. All right. O. K.

I am sorry. I had something that I had to take care of.

By Mr. THORSON:

Q. Dr. Cyert, do you know whether in the electrical conspiracy cases the conspiracies alleged were in fact proven?

Mr. MELLOTT. I object to that, Your Honor. He has indicated already that he didn't have any knowledge of these cases. I object to the form of that question.

The COURT. I am going to sustain that.

[12,276] Mr. SPRADLIN. I object to it on the grounds I stated.

The COURT. I sustained that objection, what the results of the conspiracy were.

By Mr. THORSON:

Q. Dr. Cyert, did you not state in your book with reference to the electrical equipment cases at page 250, that although these collusive agreements were in——

Mr. DELONE. I object to the reading of the book, "Did you not state in light of the testimony yesterday • • •" As Dr. Cyert said, he did not author this part of the book. He co-authored it.

The COURT. You do not vouch for the reliability of that book, do you, Doctor?

[Laughter.]

Mr. DELONE. On this very subject, he said this was from a magazine article from which it appears, and he testified yesterday it came out of Fortune Magazine.

Mr. THORSON. If Your Honor please, if the witness can draw upon magazine articles and newspaper accounts, he certainly ought to be able to draw upon an economic study by a former faculty member of Harvard University.

The COURT. Well, he says he can't.

[12,277] So I——

Mr. THORSON. May I continue my question, Your Honor?

The COURT. Continue your question, but the results in the electrical equipment cases, and there were a large number of them, have nothing to do with anything we are trying here.

By Mr. THORSON:

Q. Did not you state in your book that the collusive agreements in the electrical equipment cases were in clear violation of the antitrust laws?

A. No, I explained yesterday that section was written by my co-author.

The COURT. Did he say it?

By Mr. THORSON:

Q. Did your co-author say it?

A. Yes.

The COURT. All right. Don't pursue that any further. That is enough of it.

By Mr. THORSON:

Q. Do you know what prompted the collusive arrangements in the——

The COURT. I don't intend to retry the electrical equipment cases before this jury, or I don't intend to retry it at any time.

• • • • •

[12,282] Q. Whether you have a formal cartel or secret collusive arrangement, which we would call a conspiracy, is it not true that members of it frequently have occasion to chisel or depart or cheat from the terms of the arrangement?

The COURT. Well, now, you better find out whether he has any knowledge of this kind of thing. [12,283] I don't know whether he has ever been in on any of it.

By Mr. THORSON:

Q. Based on your knowledge of business and businessmen's behavior and of firms and people within firms.

A. I tried to answer that several times before.

What I have indicated is I don't have any personal knowledge, no. That is something that is alleged to be the case, and has been written about in the literature.

Q. And did not Professor Cohen state in his portion of your book,

> There often is an incentive for firms individually to chisel on the cartel. For the cartel to hold together, the larger firms must be able to supply economic sanctions against the chiselers, or there must be legal action

> which can be taken against the price cutter or all firms must realize it is to their long-term interest to maintain the cartel agreement.

Would you agree with that statement?

A. Yes.

Q. Now, of course, if you have the secret, illegal conspiracy, legal sanctions are not available to impose against people who depart from the agreement, are they?

A. I would—it would be difficult to think of what they might be.

Q. With reference to the NRA, which is referred to [12,284] at page 252 of your book, a discussion does occur with respect to widespread evasion of the cartel prices and this was the formal cartel which existed for a period of time under the NRA, was it not?

A. Yes.

Q. Do you know whether different economists sometimes disagree on their conclusions based upon the same set of observable facts?

A. I think this is—I think this is a fair thing to say, sure.

• • • • •

[12,290] Q. Did you not write in your book, at page 259, and quote:

> The greater number of firms in the market, the higher the probability that price will move toward the competitive level. This proposition must be qualified slightly by stressing that the size [12,291] distribution of the firms is critical.

And, going on: "The second factor that is critical in judging the behavior of price in an oligopoly market is the entry problem."

Did you study those two critical problems which you referred to at page 259 of your book?

A. They weren't relevant. They weren't relevant for this particular study.

Q. Wasn't the gypsum business an oligopoly?

A. Yes, but what I am talking about, there——

The COURT. For those of us who don't understand Greek, would you tell what an oligopoly is? I am assuming that that's Greek. I don't know.

By Mr. THORSON:

Q. Would you tell us, Dr. Cyert?

A. Yes, Your Honor. I would be glad to explain that.

This just follows from the notion of a monopoly, which is one seller; and duopoly, where you presumably have two sellers; to oligopoly, where you have a number. No one is precise about the number, but it would be fewer than the other case, which would be the case of competition.

The COURT. In other words, where a few, without defining "few," which would be a variable, according to the industry itself.

The WITNESS. Right.

[12,292] The COURT. Relatively few companies control or overwhelm the market, the field.

The WITNESS. That's right.

Mr. MELLOTT. If Your Honor please, I do not believe the witness had an opportunity to fully answer that last question.

The COURT. I am sorry. Did I interrupt your answer?

The WITNESS. I think that we—could we have the last question read?

The COURT. You see, what happens, Doctor, we judges—and I think judges ought to still be lawyers—sometimes use legal terms and assume that every body knows what we are talking about, because we think we do, and it isn't always true, and—

The WITNESS. I understand.

The COURT. And when we get a technical term like oligopoly, I think that the members of the jury have to know what we are talking about to understand it.

The WITNESS. That's a very good point, Your Honor. There is now, generally, a lot of use of jargon, in economic life, in particular.

[Question read by Court Reporter.]

The WITNESS. Yes, I think that's right.

The COURT. All right.

• • • • •

[12,296] By Mr. THORSON:

Q. Now, suppose the gross of the single plant producers—which include Republic, Texas Gypsum, American Gypsum—was because they came on the scene and started to do things different outside the status quo. Would you agree with your theory that an effort to maintain that status quo, to keep them from gaining too much market penetration, would be a hallmark of collusion?

A. No. That's not the same thing that I am talking about. Are you—Let me just try to rephrase what you are saying to make sure I understand it.

You are saying that if there was an effort to reduce their market share, which had gone up by two or three percentage points, would a hallmark of collusion be that there would be an effort to knock down those firms which had gone up two or three per cent? Is that what you are saying?

Q. To keep them from capturing an increasing share of the gypsum wallboard market?

A. No, that wouldn't have anything to do with collusion. What I would expect is happening is that at first those firms are perhaps cutting prices further than has happened before. This is speculation, let me emphasize, but it is not, I think, an unreasonable kind of deduction.

They would be cutting prices, they would be [12,297] taking a small amount, and the other companies wouldn't really pay too much attention. Then as they got a big chunk the company or companies that would be hurt by them would begin to say, "Look, we are losing our share of the market. We better start doing something about it." They get after their salesmen, they'd start worrying about how they were quoting their prices and so on.

I think that happened, for example, with U.S. Gypsum, and probably National when Georgia-Pacific started driving in.

I think, for example, that Georgia-Pacific's decentralization pricing was one of the factors which caused U.S. Gypsum to start changing its market structure.

The COURT. Dr. Cyert, if that's so, wouldn't that affect the spread on that chart you made? In other words, if in particular areas, single plant producers, there was an effort to meet what you said would be a logical deduction, wouldn't that

affect the spread on your chart? If somebody tried to meet that competition.

The WITNESS. Well, it might reduce the spread in the sense that if these producers were producing at a lower price. That's right. At one time it might look—it might be higher. Then these others would start, as they started to meet, might get lower.

The COURT. Widen the spread. Because [12,298] some would be lower, particularly if it was in certain parts of the country.

The WITNESS. I would say that when the spread was the highest might be the point at which the firms began to get worried. And when they started to meet, it would narrow.

* * * * * * *

[12,314] * * *

Q. Did you make any comparison studies to determine why any single-plant producer in the southwest might ship to Minneapolis or to Chicago or to the Atlanta area or to the California market?

A. No. That was not—that was not relevant to the—to our study.

In the first place, we had no data on any single-plant producers.

In the second place, we were studying whether there was collusion among these firms, and we wanted to look at where that collusion would take place, and it is clear that it must take place in the large market areas, and all we found was competition.

Q. If you were to assume, in a hypothetical, that, at the end of 19—toward the end of 1965, there was [12,315] increasing price cutting being experienced in the market, there was a down-turn in housing starts, in total gypsum wallboard sales, and there was a growth—an increased market penetration by the single-plant producers, but, at that time, the major companies adopted and established higher uniform prices, which continued for some time thereafter—would that, to your way of thinking, indicate a hallmark of collusion?

A. Well, no. I mean, that's not a—that's not something—in the first place, I indicated, earlier, that one of the hallmarks of collusion is keeping list prices constant.

In other words, if you have got a collusive arrangement, keep those list prices constant, so you don't have to get together again to get changes.

Q. Would keeping uniform in increasing list prices be a hallmark of collusion?

A. No. It is constant—constant. You don't want to change them. That requires more agreements.

Q. Increasing prices would be inconsistent with collusion?

A. Yes. That's what the data show. The general studies that I was referring to—that I referred to—show that there are no changes—or, let us say, very few changes. Now, what I say there—I don't mean that there could never [12,316] be a change, but the point is, you want to have few changes, as you can see, because that just upsets conditions, so you have to get together again.

• • • • •

[12,318] Q. Did you make any effort to determine whether any of the transaction prices, such as you plotted on the Joint Exhibit 18–A for Pittsburgh in 1969, were at some particular five percent or series of five percents off of list price?

A. No, we did not.

Q. So you didn't make any effort to determine that; is that right?

A. No. There was no reason to. What I was interested in was this kind of range that you see before you, the kind of range of prices, the wide dispersion, the varying quantities. This is what I was after. This, to me, is the picture of competition. It is not of collusion.

Q. Do you know whether, prior to the offering of any of the transaction prices indicated on your chart, Joint Exhibit 18–A, there was a telephone communication between or among two or more of the companies which are listed on this chart?

A. How can I know that? How could I know what? I came into the case last summer, and we are talking about 1969. [12,319] I mean, that's impossible.

Q. If you were to find a rather large amount of transactions or sales at an identical price by more than one of the companies, would you, as an economist, want to determine whether there

was any prior communication with respect to the establishment of that price?

A. I—that would not be my initial—the initial thing that I would look for; no. What I would want to do would be to try to get a better model of what determined prices in the market. I would want to look at things like what was happening to housing starts, what might be happening if there were foreign competition, depending upon what the market was. There would be a lot of things. That would be the very last thing, because I would assume I could never get that kind of information, and, you know, if the answer—the answer—well, that's just—that's enough. I would just not—that would not be the first thing that I would turn to.

Q. If you were to assume that telephone calls were made between and among the competitors in an effort to keep the prices the same, would you regard that as the hallmark of collusion?

A. Well, when I talk about the hallmark of collusion, what I am talking about are the way in which, from an economic standpoint, I would characterize collusion.

[12,320] If you are asking me, is collusion in—are you saying, in a legal sense or an economic sense—how did you want me to answer this?

Q. In the sense as you understand it and in the sense that you have related to us in your testimony.

A. If I found that people were making telephone calls, trying to keep prices the same—is that what you are saying? Is that what you are asking me?

Q. Yes.

A. Would I consider that collusion?

A. Within your definition of the term.

A. Well, I guess I would want to know a little bit more about what—I would want to know, I guess, a lot more about specifically what it is that they are saying.

Q. But you would have to know——

A. If there is an agreement that, yes, we are going to keep the price at such and such—I mean, that's my understanding of collusion.

If someone calls up and says, "What is your—what's your price for such and such material," that's—that's a perfectly legitimate thing. People do that. Or, if someone calls up——

Q. Legitimate—I am sorry.

A. I mean, that's a common form of getting information; or, if a salesman comes in and says, so and so is—this [12,321] customer claims that they can buy this from another company, at a cheaper price—I mean, there are many ways that a business firm has to get information about the market.

[12,322–12,332] By Mr. THORSON:

Q. So, would you agree that if this price, or this price, or this price, or this price, or that price were arrived at as a result of a telephone conversation between two or more of these competitors, you'd have to look at the nature of the telephone conversation, what was said, the circumstances that gave rise to it, and what decisions were based upon that conversation; would you not?

A. I'd have to do a lot of things. I don't know whether that's all. I would want to think that thing through in much more detail.

Q. You'd have to at least make an analysis of those things; would you not?

A. What you have given are a series of facts. I mean, what you'd want to do would be to analyze the implications of those facts. That's what I would want to do to see whether those are significant.

Q. You would at least have to analyze those facts; would you not?

A. The implications of them, yes.

• • • • •

[12,346] Q. In your study, Dr. Cyert, did you include any [12,347] analysis of the terms of sale, the credit terms?

A. No.

See, we wanted to be certain that we didn't get anything extraneous in there. We wanted the prices at which this commodity was exchanging for in the market. We didn't want to lower, put a lower price, for some customer who happened to have more cash than another customer. We wanted to know what are they paying for the commodity; what price are they paying for the commodity.

Q. So even though in your opinion there was no collusion with respect to price, you would be unable to say on the basis

of your study and analysis whether there was any collusion with respect to the terms and conditions of sale?

A. I did not look into that, no, absolutely not. I was looking at the whole question of was there collusion in pricing, was there a conspiracy for pricing.

• • • • •

[12,366] Q. Mr. Cyert, I understand that with respect to some of your studies you did not include certain of Georgia-Pacific data. Is that your testimony?

And, partly because they had two different methods of shipping or selling the wallboard?

A. You are talking about the price data, and you are talking about the warehouse sales of Georgia-Pacific?

[12,367] We did not include warehouse sales, because we wanted to get these, these data on as consistent a basis as possible.

Q. So you only included direct sales; is that correct?

A. Yes. Yes.

Q. Did you, at a preliminary stage in your study, include both the direct and the warehouse sales?

A. I believe we looked at those at one point before we realized that these were different sorts of things.

Q. And you decided to amend the study and leave out the out-of-stock sales; did you not?

A. Well, we decided that the study that we wanted to make was one that should be made without those warehouse sales.

Q. Our data sheets, which are—I believe Joint Exhibits 4—Oh, at least up through 11 or 13. On the right-hand side you had two columns for G–P?

A. Yes.

Q. One G–P–D?

A. Yes.

Q. And one G–P–WS?

A. Right.

Q. And the "WS" stands for warehouse sales?

A. Right.

Q. And the "D" stands for "direct"?

[12,368] A. Right.

Q. On these exhibits I don't notice any sales under the warehouse column.

A. Yes. We were trying, as I say, we were—We decided after learning what the nature of the warehouse sales were, that those were not proper to include. Because it would be like, you know, including apples and oranges.

We wanted to compare like things, and these were all direct sales.

Q. Wasn't there another reason that you decided not to include the Georgia-Pacific warehouse sales?

A. No. No.

Q. Did you make any observation as to the ratio between the direct sales and the warehouse sales, which was more predominant?

A. Well, I think—I think the direct sales for these purposes were the ones that were relevant for us, that's the reason that we made it.

Q. Weren't the direct sales in the overwhelming majority of instances, as you observed them as you were collecting the data?

A. Weren't they what? Weren't they the overwhelming . . .

Q. Didn't the direct sales constitute the overwhelming majority of all the G–P sales?

A. Well, I certainly think they are the bulk of them. [12,369] but I don't know the percentages. I don't know if I'd say overwhelming. I don't know exactly what you mean when you say "overwhelming for the majority." But certainly the direct sales are very important.

[12,370] By Mr. THORSON:

Q. Is it not also true when you made your initial examination you found that the Georgia-Pacific warehouse sale transactions were at higher prices than the direct sales transactions, and then you wanted to keep those higher prices out of your study?

A. No, that is a false statement.

• • • • •

[12,373] Q. Dr. Cyert, immediately before the luncheon recess I asked you whether you had omitted from your price study the transactions and the prices for sales from the Georgia-Pacific warehouse out-of-stock sales and whether the omission

was because those sales figures would have shown transactions at higher prices and you answered stating that the statement included in my question was untrue.

A. Yes.

Q. Did you not?

A. Yes.

I would like to elaborate on that.

Q. Now I will show you——

Mr. DELONE. The witness——

Mr. THORSON [continuing]. A——

Mr. DELONE. May the witness complete his answer?

The COURT. He has not asked the question yet.

[12,374] The WITNESS. I said I would like to elaborate on it.

The COURT. There is no pending question, Mr. DeLone.

Mr. DELONE. Mr. Thorson asked if he had responded a certain way.

The COURT. No, he didn't. He said you testified this morning, and he recounted the testimony and now he is going to ask a question.

By Mr. THORSON:

Q. Now I will show you a document which has been marked for identification as Government Exhibit 3097.

Do you recognize that document as a group of your prior, earlier work sheets prepared in connection with this study?

A. Yes.

Q. And on those earlier drafts you had included Georgia-Pacific transactions for out-of-stock sales, had you not?

A. Warehouse sales, yes.

Q. Warehouse or out-of-stock sales?

A. Well, warehouse sales. Let's stick to that, because there is a point I would like to make on that.

Q. Very well.

And on the final drafts which were introduced in [12,375] evidence as Joint Exhibit 3 through—oh, the numbers go up, I believe, as high as 41—the very same columns for Georgia-Pacific warehouse sales have no entries in them, do they?

A. That is right.

Q. Now if you would refer to the first page——

Mr. THORSON. Your Honor, I offer in evidence GX 3097.

Mr. DELONE. Have you copies for me?

Mr. THORSON. No, it is a very voluminous document. I don't even have a copy for myself, Your Honor.

The COURT. Show it to Mr. DeLone.

Mr. DELONE. May I see it?

Mr. THORSON. These were documents which were sent to us by defense counsel.

Mr. DELONE. I don't know who sent them and I don't know what documents they are, because they now have a Government Exhibit number on them and I would like to find out.

The COURT. Look at them, sir.

Mr. DELONE. Might I ask Dr. Cyert a question or two on voir dire about these documents? The Government just offered them.

VOIR DIRE EXAMINATION

[12,376] By Mr. DELONE:

Q. Dr. Cyert, Government Exhibit 5097 is a sheaf of—you say it is a sheaf of work papers that—or a collection of work papers that come from the study you were doing?

A. Yes.

Q. And I notice on the first page and a number of others the word written "old".

A. Yes.

Q. Are these work papers which you used in your final study?

A. No, they are not. They are the—they are—they were some preliminary work which, let's say the data in the first three columns are—would be consistent, I believe, with the later data. But they are not things that—this document itself is not one that we used in the study.

Q. But you do recognize them as things——

A. Yes.

Q. [continuing]. That came from your earlier work?

A. Yes, right.

Mr. DELONE. I have no objection.

The COURT. They are admitted.

[Government Exhibit No. 5097 was received in [12,377] evidence.]

CROSS-EXAMINATION (CONTINUED)

By Mr. THORSON:

Q. Refer, if you would, to the first group of exhibits in 5097

and that is clipped together in one group, a series of work sheets relating to the Pittsburgh market areas, is it not?

A. Yes.

Q. And on the first page is there indicated a price for a Georgia-Pacific warehouse sales transaction?

A. Yes.

Q. And what price is that?

A. 53.

Q. $53 even?

A. $53.25, I think it is. Yes, $53.25.

Q. Is that one of the highest prices indicated on that——

A. Yes, it is.

Q. [continuing]. Table?

A. Yes, and it would have increased significantly the dispersion of the prices, had we plotted this, which was the main reason—the reason why we modified the procedure. I would be glad to get into that and save time, if you want to proceed that way.

[12,378] Q. If you just answer my questions, perhaps we can handle this most expeditiously, Doctor.

Is that $53 price the only price indicated for Georgia-Pacific warehouse sales on that page?

A. On the first page, yes.

Q. Now I would like to put up on the easel your price dispersion chart, which is Joint Exhibit 18–A.

Now, if that $53 price for Georgia-Pacific warehouse stock transaction were plotted on your Joint Exhibit 18–A, where would it fall on this chart?

A. Right in this vicinity.

[12,379] By Mr. THORSON:

Q. At or about the location of this line, here?

A. Yes.

Q. And do you know whether that was the list price in effect at the time of that transaction?

A. This was in the first—first period, and was not—you say, do I know what the level of the list price was, or whether that was the list price?

Q. Do you know whether that was at list price?

A. No. I think that was above list price.

Q. That's the Georgia-Pacific warehouse stock sale, above list price?

A. Of course. Yes. Do you want me to explain it?

Q. Well, were there any other—if you just briefly flip through the data sheet for Pittsburgh, were there any other Georgia-Pacific warehouse stock sales that were included on your preliminary draft, but omitted from your final summary and chart?

A. There were some in the second quarter, and there were some in the third quarter. This is all for one area; namely, Pittsburgh.

Q. All right. What were the prices in the second quarter indicated for warehouse stock sales?

A. Well, there was $53.25; there was $54; and there was $58.

[12,380] Q. $58?

A. Yes. See, that's the point I was making before, $58.25. That's one of the points I was making, you see, that we would get some more up here, which would give the appearance of greater dispersion, which would not be a fair way to do things.

Q. I would have put more transactions, more sales, at the higher end of your chart; would it not?

A. Right; and made it look like a more widely dispersed—greater dispersion of prices, which would have—as I will explain, when you give me a chance, why that would have been unfair—unfair to the objectivity of the case.

Q. And you have testified, of course, that the warehouse managers, you say, had, according to what you were told, had autonomy over prices.

A. No, I have not testified on that.

Q. Oh. Perhaps I misheard you, then.

Well, if there were additional transactions at $53, would that have increased the range of dispersion of prices?

A. Well, you see, it would have shown the precise dispersion that I have tried to emphasize here is dispersion where there are significant quantities, and, when I talked earlier, when you had discovered a particular price, which we explained, later, why it was left out—I pointed out [12,381] that that really wasn't relevant, because the thing that was relevant were to look at those areas in which you had the bulk of the transactions taking place.

Now, if these were extended, and these were extended, then, I couldn't throw those out as extreme points. I would have to say dispersion goes from here to here, and that would have been unfair to you, as I will shortly explain—why it was unfair to you—whenever you give me a chance, I will be glad to explain that.

The COURT. Doctor, please allow the attorneys to conduct the trial. You are a witness.

The WITNESS. Okay. I am sorry, Your Honor.

The COURT. And don't be an advocate.

* * * * *

[12,393] Q. * * * Now, looking at Joint Exhibit 13, which you have before you, do you see a $39 price for Celotex?

A. Yes.

Q. And what is the volume, the transactional volume for the $39 price?

A. Well, that is 349,000 square fet.

Q. Would you look at Celotex Exhibit 1149 and tell [12,394] us where that 349,000 square feet transaction or group of transactions at $39 came from?

A. Well, what it would require would be to go through each of these, and these, but this is for the whole year, and pick out those transactions at that price, and then you would have to add up the quantities.

Mr. DELONE. I ask that the witness, when he is referring to a document, tell us which it is so we have some idea of what he is talking about for the record.

Mr. THORSON. I handed the witness my copy of that particular document.

The WITNESS. No, 1149 you are talking about. I am looking at 1149, and what I am saying is I would have to go through each of these invoices to try to pick out the price——

What was the price that you referred to, $39?

By Mr. THORSON:

Q. $39.

A. $39.

And get the transactions for the net price of $39, record the quantities and then add up those quantities. And, you know, that is going to be a time-consuming process.

Q. Would it be very time-consuming if you were to flip through page by page and find out that there isn't [12,395] a single transaction at $39 for Celotex in the Denver market?

A. Well, I wouldn't have to do any adding under those conditions.

[The witness looks through the exhibit.]

No, I do not find that transaction.

[12,396] By Mr. THORSON:

Q. So there is no support whatsoever for the $39 price for which you have recorded 349,000 square feet of one-half inch wallboard, is there?

A. No, I—again, I—as in the other cases, I know an explanation can be gotten. At this precise time in the Celotex data that we have here, we don't—we don't have that.

• • • • •

[12,410] RE-DIRECT EXAMINATION

By Mr. KECK:

Q. Are you able to determine, from the eight SMSA areas and the data for them which you gathered and analyzed, what kind of dispersion and quantities you would have found in Houston or Dallas, had either one of those been selected by your random process instead of New Orleans?

A. Well, I think the study that we did, that included these others, which was what we called the market penetration study—I think that study will show that there was competition of a severe nature, and, from what I have inferred from Mr. Thorson, I gather that there was intense competition in the Dallas area, so that I would assume that, had we had that, it would have strengthened the case, the basis, although I don't see how it could be much stronger than it already is, that there was no collusion, but competition.

[12,411] Q. Well, are the eight SMSA's which you have described here a representative sample of the 33 or the 50 that you also talked about?

A. I consider them a representative sample of the 33.

Q. And that would be typical that would include, then, Dallas and Houston?

A. Yes.

• • • • •

[12,413] By Mr. BARTLIT:

Q. Now, yesterday, at page 12,240 of the transcript, you were asked these questions, and you gave these answers:

> Question. If there were a trough and a downturn in the gypsum wallboard business as of late 1965, and if there were an increase put into effect at that time, would you expect such an increase to take effect and hold in the marketplace?
>
> Answer. Well, all I can judge by is what we have seen here from 69 to 73, and the answer is, no, I would not on this basis expect it.

Now, I would like to ask you this question, Professor Cyert, Dr. Cyert: would it be consistent with accepted economic principles governing competitive industries if the largest company in an industry increased prices at the time stated in your testimony, at a time of an economic downturn, and, thereafter, lost a substantial part of its market share?

A. Well, that's—my inclination would be to predict that that is what would happen.

[12,414] By Mr. BARTLIT:

Q. You would expect to see that happen in a competitive industry wouldn't you?

A. Yes.

Q. Now, Dr. Cyert, Professor Cyert, there is testimony in the record given by an economist called by the prosecution that from 1965, when the increase that the Government asked you about took place, until 1967, U.S. Gypsum, the largest company in the industry, lost 16 percent or more of its market share.

Would you call 16 percent of a company's market share substantial?

A. It looks to me as though it is almost 50 percent of its market share. The market share might be——

Q. No. You got——

A. Well, maybe that's 38 percent there.

Well, anyway, it is 40 to 50 percent of the market share.

Q. Well, the Government economist has testified that between here and here U.S. Gypsum—which I think Mr. Fricano called this color puce or salmon, something like that—this color, that they lost, this was 16 percent of its market share?

A. Yes.

Q. Now, I want you to take his testimony as fact.

[12,415] A. Yes.

Q. And I ask you whether a loss of 16 percent of market share by a company like U.S. Gypsum is substantial in your view?

A. Well, that is—I was saying yes, and I was giving the reason why, because it is a high percentage of its basic market share.

Q. And would it be consistent with your conclusion, regarding the competitive state of the industry during the period 1969 through 1974, for a company which increased its price at this time to lose a substantial part of its market share thereafter?

A. I would expect it to, yes.

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[12,416] By Mr. DeLone:

Q. And there was reference here during the course of Mr. Thorson's examination this afternoon, to the fact that in your final study you had excluded what was referred to as out-of-stock warehouse sales of Georgia-Pacific?

A. Yes.

Q. And you offered to explain why that had been excluded. But I would like to now give you the opportunity to make that explanation.

A. Thank you.

What we were striving for was a similarity in the kind of transactions that we were dealing with. And the direct sales are made—By "direct sales," we are talking ordinarily about sales that are—about shipments that are made from the producer to the customer.

Georgia-Pacific's warehouses make some of these direct shipments. In other words, someone—a customer may call up, and it so happens, let's say, that the warehouse has a truckload in stock, and it will load up the truck and ship it out to the customer rather than have it coming from the plant.

[12,417] Now, mixed up—we discovered—in the Georgia-Pacific warehouse sales, were sales like that—which are consistent with what we mean by direct shipment—with other kinds of sales, which include a great deal of additional services.

For example, the warehouse may send gypsum board out to a builder and agree to put the board that needs to go on the walls in each of the rooms in which it is supposed to appear. So that there are additional services that would go on that.

And, it was impossible to separate these two types of sales.

You see, we have never had any concern here about level of price. I mean, from our standpoint that was not the question. What we were looking at was the dispersion of prices; and our concern was that if we had included those transactions, which included additional services which naturally the dealer was, the warehouse was, the branch was compensated for, that that would increase significantly the dispersion.

And it was really a different product in a real sense. It was the product for which there was a real transaction plus these additional services, and therefore it did not seem, in our view—since we were trying to get at the truth—it did not seem to us to be proper to include [12,418] that.

Q. And if you had included it, it would have exaggerated the dispersion in your view?

A. Exactly.

It would have been, you know, it would have given me a much wider range of prices, and it would have made the thing, made the market look as though it were even more competitive than in fact it was.

Q. Now you did include, though, from Georgia-Pacific all of the shipments—although the orders were taken by the warehouse and the pricing was made by the manager of the warehouse—if the shipment went from the factory direct to the customer rather than being shipped to the warehouse and then, but it went straight from the factory to the customer, those are the shipments you did tabulate even though they were booked through the salesman at the warehouse under the warehouse manager?

A. That is correct.

And those were comparable to the sales we had for the other companies—transactions for the other companies.

Q. Thank you, sir.

Is that the explanation you wanted to give?

A. Yes, it is.

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[12,433] The COURT. • • • Now, Dr. Cyert, these are some questions which I am paraphrasing, perhaps, but which were asked—the jury asked me to ask you.

The WITNESS. Yes.

The COURT. Apparently there were certain discounts which were called fast 5's or things like that, for prompt payment of bills. Did you consider that at all in your statistics as to transactions price?

The WITNESS. No. What we were looking at was the prices that the product actually exchanged for in the market. I didn't want to include those, because that might, for instance, mean that larger buyers with bigger cash might, in fact, be getting a price that really didn't represent what the thing was being—what the commodity was being transacted for. These are—these credit terms are the result of payment, rather than purchasing in the market, so I did not include those.

The COURT. There is some evidence that some discounts were given in the form of cashier's checks. Did you know about that and take that into consideration in determining transaction price?

The WITNESS. If I understand the situation, I think it is something like this: That credit memos were sometimes issued after a transaction was made; that is a company might buy something today and it would [12,434] be invoiced at a particular price, but it was told that it would be getting a lower price and eventually there would be a credit memo which would go in.

The COURT. I am not talking about that. Sometimes that was done, but some other times instead of using a credit memo for various reasons the discount was given in the form of a rebate by cashier's checks.

The WITNESS. I would believe that we would have those on our chart, on our prices as showing the lower invoices—as showing the actual transactions. I think we caught those in our transaction price.

The COURT. Did you consider in the question of what industry, what company led price increases, that as a part of a conspiracy, that could be rotated?

The WITNESS. Yes. I recognize that, but we did not—we did not, in fact, place in terms of the studies we did—we did not need, really, to look at this question, because the only—in terms of list prices, the only thing we were interested in were numbers of cases and that was being confirmed with numbers of cases where there had been collusion proved, of course. On the other occasions on transactions and prices, all we were interested in was the transaction price and there was no question of who led. So as it turned out, that did not come in.

I would agree with the general notion of the [12,435] question that is quite right in a conspiracy, you could get rotation.

The COURT. Now, if your dispersions matter, did you take into consideration at all that the size of the buyer and the amount of his yearly purchases would lead to a variety of prices?

The WITNESS. No.

The COURT. In your conclusions, not the chart itself.

The WITNESS. No. I did not take that into account.

The COURT. Did you give any consideration to the fact that a transaction price could depend on the size of the purchaser, even though his original purchase was not great? What I am getting at, that they might want to get them as a customer in the future.

The WITNESS. Yes.

The COURT. Was that taken into consideration?

The WITNESS. Yes. We had in all of these cases the quantities and we could take that into account.

The COURT. Did you consider that various companies had various types of distribution [12,436] systems and, if so, did that affect your study at all?

The WITNESS. Yes, we did, and I viewed that as, again, an indication of the kind of intense competition there was here. Because the fact that they were all trying to—trying to find different ways of distribution is further evidence to me that they couldn't rest secure in some sort of collusive arrangement; that they were competing.

The COURT. Did you take into consideration that large purchasers sometimes split orders between various companies for

the purpose of having more than one source? Did you take that into consideration?

The WITNESS. Yes, we did.

The COURT. Now, did you—you did not take into consideration Georgia-Pacific warehouse sales. If National, United States Gypsum and Celotex had warehouse sales, did you take them into consideration?

The WITNESS. They did not have warehouse sales.

The COURT. All right.

I have a new one here now and I have to read it myself.

Well, the first question asked I think has already been asked, so I will not ask it again.

Would it have done any good to compare accounts [12,437] receivable of the billing company with the accounts payable of the various buyers? Would that be productive of anything?

The WITNESS. I don't believe so. I don't—I don't think that would have borne on the study. At least I don't see immediately how that could be.

The COURT. They directed a question to me as to a question of law and I can only answer that question by saying that we are bound by the principle of stare decisis, which means what has been said in other cases, particularly appellate cases I am bound to follow. This has something to do with the impeachment as to collateral matters and the courts have said if you attempt to impeach on collateral matters, you are estopped with the answer. That is the law, and it has been so for a period of years and I am sure there was good reason for it, but I will not go into that any further.

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[12,438] EDWARD W. DUFFY

DIRECT EXAMINATION

By Mr. KECK:

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Q. According to the stipulation between the parties in this case, Mr. Duffy, between February, 1971, and December, 1973, you were the president and chief operating officer of United States Gypsum Company. Do you continue to hold those positions today?

A. Yes.

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[12,439] • • •

Q. Would you briefly recount your employment history with U.S. Gypsum prior to 1961?

A. Well, I started with the company as an assistant in the research laboratory, laboratory assistant, in 1941, and stayed there until 1945, when I transferred to the industrial sales department, and I was away from the company during part of 1946 and 1947; returned in 1947, as, also, in the industrial sales department, where I held several assignments until 1959. And, at that time, I was assistant to the vice president of sales for about a year, back to industrial sales for the year 1960.

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[12,430] Q. Now, Mr. Duffy, referring to the blowup of the exhibit just introduced which is labeled 1200–A, what if [12,431] anything do you find significant with regard to the trend in U.S. Gypsum realized prices and market share during this early period, 1961 through '65?

A. Well, the exhibit shows that our realized price declined each year from 1961 through 1965, and that U. S. Gypsum's market share declined each of those years with the exception that '64 and '65 are the same. There was no decline in '64 and '65. Each of the other years declined from the previous year.

Q. Now, does this exhibit show the amount by which your realized prices declined in the 1961 to '65 period?

A. Yes. The decline over that total period was $5.76 per thousand.

Q. What is the approximate percentage reduction?

A. About 15 per cent.

Q. Now, looking at the prior exhibit, 306–A, if we compare your realized price for half-inch board in 1965 with the price shown on the earlier exhibit, with the realized price in 1970, is it correct that another $5.50 was lost from your company's realized price during those years?

A. Yes.

Q. That is a total of $11.25 in ten years lost in realized price?

A. That is right.

[12,452] Q. Or approximately 26½ per cent drop in ten years?

A. I would have to do the calculation, but I think that is about right.

Q. I have done it and would suggest that that is the number.

A. Yes.

Q. Is it also correct that the end of 1973 your realized price was still $1 lower than the level in 1965?

A. Yes, just $1.

Q. And $6.76 is lower than the level achieved in 1961?

A. That is correct.

Q. So that over the entire 13-year period, your realized price goes down $6.76?

A. Yes, in spite of the inflationary influences on our costs and that sort of thing.

Q. And that is approximately what per cent over that entire period?

A. Well, to 1973, the cost of gypsum board, I would estimate, has gone up 23 or 24 per cent.

Q. And your realized prices have gone down approximately 15 per cent?

A. That is right.

[12,453] Q. Now, did your company's management ever attempt to do anything to stop or reverse this decline in its realized price and market share for half-inch wallboard?

A. Yes, we employed a number of different strategies in order to get our prices of gypsum wallboard up.

In the period of 1961 to 1964, through '64, I suppose you would term our actions as a defense strategy. That is, we, our sales people, sought and found competitive lower offerings of competitors in the field, and we met those as we found them and where we found them. This has been the company's pattern of activity in the years prior to that, and we continued it through that period.

Q. All right. Now, you say you were following a defensive strategy in the period of '61 into '65; is that right?

A. Into '65, yes.

Q. How do you account for the fact that that defensive meeting of competitive strategy lost you $5.76 in realized price?

A. Well, those were the prices that we were finding in the field. We were meeting them, and our realized price decreased $5.76.

Q. Was that entirely the result of competition?

A. Yes, entirely the result of competition.

Q. Now, how long did you continue that so-called [12,454] defensive strategy?

A. Well, by 1965, mid-year, there were multiple discounts in the field. We were meeting them. We had a very chaotic market, very disorderly market. Our salesmen hardly knew what the prices were. Our customers hardly knew what the prices were. So we decided to change our strategy, and we adopted a strategy that called for decreasing zone prices of wherever we found discounts greater than 5 per cent below the published price. And we followed that very vigorously. We were trying to bring some order into our pricing in the marketplace.

Q. What happened?

A. Well, during that summer the printing presses were hot. We were issuing new published prices very, very frequently. In fact, in some instances a dealer would get a new published price from us, and there would be another one in the mail almost before he could read it. The result of that strategy was that the decrease in the market prices and our realized prices was that they decreased more rapidly. It was accelerated.

And so we realized that after a time that this was not accomplishing what we set out to accomplish by any means.

Q. You changed strategies again?

A. Yes, we began to study in the fall of '65 what [12,455] we might do next. We had tried these things, and they didn't seem to work, and so we had several committee meetings and discussions, discussions among the managers and among the top management of the company to determine what our strategy should be, and that resulted in a decision that we would announce the new published prices in December for an effective date in December, and from there on we would sell only at our published prices.

Q. What was the reasoning behind that strategy?

A. Well, there were a good many factors in it. Our industry share had been decreasing; our realized price had been decreasing; we had tried the route of meeting prices as we found them; we tried the route of decreasing our published prices by zones; and this had provided a result that was unsatisfactory to the company. Our profits continued to decline under those circumstances. And so we thought we had better try this other activity.

Q. Now, in your judgment was this third strategy that you have mentioned and became effective in December, 1965, was it successful?

A. No, it wasn't successful at all. We were able to increase our realized prices to some degree, but our industry share dropped precipitously. In fact, we were losing business to our competitors in great quantities during 1966 and on into 1967. And so this strategy would [12,456] have to be considered very unsuccessful.

Q. How long did this strategy go on; how long was it followed?

A. Well, there was some erosion from the policy of selling only at published prices during 1966.

In 1966, as I testified earlier, I was the general manager of the Central Construction Products Division, and in my division at that time I recall two instances in which we met lower competitive prices, one with the Wickes Company, Saginaw, Michigan, and the other with National Homes who were prefabricated home manufacturers in Indiana.

Q. When did you get away from this policy by way of the date, in what year?

A. When did we change that policy?

Q. Yes.

A. Well, we had a meeting in Chicago in 1967 of the general managers of all of the construction products division with Mr. Rembert, the executive vice president of the company, Mr. Watt and others. And at that meeting it was decided that the company would become more aggressive in meeting the lower price offerings of competitors, and we did at that time begin to do so.

[12,457] By Mr. Keck:

Q. Now in the period from the time this December, 1965 change became effective, you testified that your realized price had increased from $36.79 to $39 and then slightly higher than that in 1967, but your market share fell off from 38.3 to 34.3, which is 4 per cent. Now what is 4 per cent? Is it over 10 per cent, is it not?

A. 10 per cent of the 38 level.

Q. And then you fell off again 2.4 points or not quite another 10 per cent in 1967?

A. That is right.

Q. Is that what you meant by a sharp drop?

A. That is right. We were losing business very rapidly to our competitors.

Q. Mr. Duffy, what is the relationship, if any, between realized price and market share?

A. Well, to be successful one has to have a balance between those two factors. If you had a high price and no business, you would have no profit and so it is part of our job to try to create the balance between the price and the amount of volume or market share that you maintain. It is an important factor.

Q. Is the reverse true, that if you have a large market share but low prices, you might also have no profit?

A. You would have very little profit, at any rate.

[12,458] Q. Did this drop in 1966 and early '67 cause you to again change your pricing strategy?

A. Yes, I mentioned this, the mid-year 1967 as a point of reference there, and I mentioned, too, that there was some erosion of the selling at only published prices policy in 1966 and in 1967, early, there were also some instances.

I recall in the county in Indiana surrounding Indianapolis, along in April or May of 1967 a competitive situation was such there that I recommended to the management that we decrease our bulletin price 2.50 a thousand to meet that situation. And then a short time after that in the county directly south of Marion County, where Indianapolis is, we reduced our price. But this—the competitive situation was intensifying all through this period and we had this meeting in Chicago—I believe it was in June of '67, with all of our construction products general managers, Mr. Rembert, Mr. Watt and others to discuss this situation.

The general managers gave their reports on the condition in their market, made very strong recommendations to the management that we abandon the policy of selling only at bulletin prices and become more aggressive in the field.

At that meeting it was decided that we would do [12,459] that and that the management would consider proposals from the division to meet lower price offerings of competition.

Q. Was Mr. E. L. Busch then the general manager of the Southern Division?

A. Yes, he was.

Q. Was he present at that meeting, also?

A. Oh, yes, he was very much present and very vocal, I might add.

Q. In September, 1967 you left the Central Division and became group vice president for all construction products division, is that correct?

A. Yes, that is correct.

Q. Following your becoming group vice president in September of that year, were there any additional changes in division managers?

A. Yes, there were. At the time I was appointed group vice president for construction products, the company also appointed a group vice president for our industrial division. I was succeeded in the Central Division by Mr. Weidman. Mr. Andy Berg, who was the general manager for the Western Construction Products Division, became the group vice president for the industrial divisions and I had the job of taking Mr. Robert Evans, who was appointed the new western or general manager of the Western Construction Products Division to his new responsibility to [12,460] introduces him to his job and train him in his responsibilities.

Q. Now, what postion did Mr. Evans hold immediately prior to your introducing him as general manager of the Western Construction Products Division?

A. He was in charge of pricing policy at that time.

Q. Who followed him?

A. Joe Baldwin.

Q. Joe Baldwin?

Following these management changes, were there any significant changes in pricing policy?

A. Well, yes, there were.

As I mentioned, almost the first official act I had as group vice president was to take Evans to Los Angeles to the headquarters of our Western Division and introduce him to his new job. In connection with that, I asked the department manager in Los Angeles to prepare reports indicating the status of our business in their market and that sort of thing. The sales manager in the Western Division reported on the company's industry share and the state of our business in those important states

west of the Rocky Mountains. And frankly, after I heard how deeply the competitors had cut into our business and how much of our business we had lost, I was both shocked and surprised and realized that we had to take very [12,461] vigorous action from that point forward in order to get our business back.

Q. Do you have any recollection of what share of the market you learned at that time you had in the Western Division?

A. I think my recollection is that we were at 14 or 15 per cent at that point in those important markets in the West. One market I recall was down as low as 9. Which meant, of course, that the large production facilities which we had to ship our goods into those markets were running at a much lower level of capacity than were our competitors' plants and this was not only important to the company from a profit standpoint, but related also to our responsibility to our employees to supply work for them and so on. It was a very shocking situation.

Q. Do you recall any other events that occurred on or about that time?

A. Well, when I returned from that trip to Los Angeles I talked with Mr. Rembert, Mr. Watt and made strong recommendations that we—that we take the gloves off and really get back into the market and meet the competitive prices as we found them.

Q. Mr. Duffy, you have mentioned Mr. Rembert. What position did he have at that time?

A. He was executive vice president and the man to [12,462] whom we general managers of the divisions reported. He was in charge of our activities.

I received approval to move immediately in those western states and, in accordance with the proposal that I made, and then as quickly as I could I talked with our other general manager in our other divisions and made trips to those divisions to determine what the status of our business was there; found out they, too, had lost industry share in large quantities—not as large as the West, but our share of the business had declined significantly—so through that fall we were in the process of stimulating our sales force, turning it around after a period when I think it had lost some of its vitality, and also convincing our customers that we were back in the market to stay, to support their activities and to be competitive and aggressively competitive.

Q. Was authority to meet prices delegated to the division general managers on or about that time?

A. Yes, as this program progressed, we recognized that we not only had to find and meet these competitive situations, but the time of response on our part had to be a great deal more rapid. We had to be able to react more quickly, so that our people would have the flexibility to meet these prices. So we granted authority, final authority to the general managers in the divisions to meet [12,463] competitive prices within guidelines, but they had the final authority in the beginning to meet one 5 off. If the discount was greater than one 5, they had to seek approval in the beginning. Then in 1968 in the spring we made it two 5's off and then a little later in the year we made it three 5's off, as the battle continued.

[12,464] By Mr. KECK:

Q. I believe you have testified that when you became group vice president in September, 1967, you soon learned of the extent of your loss of industry position. Do you recall what the company's performance was for gypsum wallboard sales for the last quarter of 1967; that is, October, November, and December, 1967?

A. Yes, sir. It was terrible. As I recall, our industry position was—or our industry share was about 28.3 percent, meaning that we had lost 17 percent of our business in just a year or so.

Q. Following the strategy of no discount?

A. Yes, that's right.

Q. Of the three months, October, November, and December, 1967, do you recall which was worse?

A. Yes. It is indelibly impressed in my mind. It was immediately after I was appointed group vice president, the following month, in fact, and we sunk to an all-time low quarter in the company's history. We were at 24 or 25 percent. We had never experienced anything like that before.

Q. What does it mean, to drop to a 24-or-5-percent level of share of market? Now, in 1965, you had 38.3. That would be a drop of 13 some plus points. What would that be, percentage-wise?

A. It is 25 or 30 percent, I believe.

[12,465] Q. Of your total business was gone?

A. Yes. It was gone. The competitors had taken it away from us. In fact, if you put it another way, there was that much of our company was gone. It was a great loss.

Q. Since these changes in pricing policy that you have described in late 1967 and into 1968, have there been subsequent changes in pricing policies by your company for its gypsum products?

A. During 1968, 1969, we followed the same pattern that I described. The competition intensified. '68 was a pretty good year. Housing starts had increased some that year. And '69 saw some drop-off in housing starts, and, therefore, the demand for our products.

We did have two situations in 1970 that I recall. The first was along about June or midyear, somewhere in there, in which we zoned—zoned around the Georgia-Pacific warehouses, in order to be more flexible and to improve our response time to that competition.

By that time, Georgia-Pacific was an extremely difficult competitor for us to cope with, because of all of their warehouse operations.

The second action that we took was that we went into the wallboard distribution business. We had been studying that situation since, oh, some time in 1968, trying to find a method to improve our profits on gypsum board and to [12,466] compete with these warehouses of Georgia-Pacific, so the plan was complete.

Then, in 1970, we went to the board of directors and asked for the funds to establish a trial program of eight or ten wallboard outlets, directed mainly to sell wallboard to drywall contractors. We had determined that the drywall contractors were the primary brand selectors in the market chain, and we did receive approval from the board, did form that trial. It was successful, and that became our subsidiary, L and W Supply Company.

Q. Mr. Wallace has testified here that you had, at the end of 1973, approximately 55 such centers. Are you familiar with those?

A. Oh, yes, very familar with it. I have been familiar with that program since its conception.

Q. And the lowering of the zone prices around G–P or Georgia-Pacific's distribution centers—was that also known as the G–P war zone plan?

A. Yes. That's what we called it.

Q. Now, in your judgment, Mr. Duffy, have these later changes in 1970 in pricing policy been successful?

A. Well, the L and W situation, I think, has been successful. It stopped the slide of those activities of—stopped the slide of our industry position, although they have not been successful in getting the realized prices up. The [12,467] realized prices continued to go down in 1970.

Q. Well, now, let's look at these charts and see how you succeeded. You became group vice president in the fall of '67 and changed the strategy. Your market share has been virtually flat since then; has it not, in approximately 32 percent?

A. Yes. Yes, fairly level.

Q. And in that period of time, your realized prices have fallen, and then have modestly come back; is that what you have referred to?

A. That's right; the low point was 1970.

Q. According to those figures, you are still four dollars below your average realized price in 1968, by the end of 1973?

A. Yes, a little bit better.

Q. Were there any other pricing strategies which your company considered, which you felt offered any hope of improving your realized price on wallboard?

A. No. We tried them all. We tried every legitimate strategy we could think of. We didn't have any other ideas. There are only so many things you can do along those lines, and, of course, as 1970 progressed, the statistics that we began to receive from the housing industry indicated an upturn in the number of housing starts, and, when we see that, of course, we know that, following the housing start upturn, [12,468] that the demand for our products will improve, and that did, in fact, happen in the early part of 1971, when there was a very sharp and dramatic improvement in the demand for gypsum wallboard, and that continued through 1972 and 1973, so that that change came about.

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[12,475] [Defendant United States Gypsum Exhibit 654 was received in evidence.]

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[12,477] Q. Now, using this chart, can you elaborate on your statement earlier that none of U.S. Gypsum's pricing strategies regarding wallboard worked?

A. Yes, I'd like to do that.

I mentioned that we followed a defensive strategy in 1963 and 1964. And this green line shows the trend of our market share.

We followed that defensive strategy, declined, as you can see.

Our realized price also declined during that same period. And it was about at this point in mid-1965 where we made the change in our policy and decided to lower our bulletin prices zone by zone at any time that the price became more than 5 percent below the published price.

And you can see what happened. There was an acceleration of the decrease in our realized price. And, our industry share continued to go downward on about the same level.

In 1965, December 15 effective date, we announced our policy of selling only at the published prices. And, [12,478] the result of that was—as you can see—our realized price did go up in 1966 and '67.

But the decrease in our market share was accelerated. And, if you extended that line, you could see that it was a situation that could not be tolerated indefinitely, or we'd have a high price and no business.

So, in 1967, this point, we made the decision that—well, we made it in about at this point in 1967—that we would become more aggressive.

And then that more aggressive posture followed, continued into 1968. You can see that we did recover some industry share, but the realized price declined moderately.

It was not a great decline in realized price.

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[12,479] The WITNESS. In 1969, continuing the meeting of competition as we found it. Realized price was declining to the

bottom point, here, in 1970, as indicated on the previous chart, and our market share declined moderately under those circumstances. I use the word "moderately" advisedly. No decrease in industry share ever seems moderate to me, but it wasn't as great, certainly, as we had experienced back in here.

In 1970, the zone prices are—on the G–P warehouses in the beginning of L and W, these two points, the realized price is very low, and the industry share is at this point. Then, I mentioned the dramatic upturn in housing starts and the demand for gypsum wallboard in March of 1971. From this point on, in 1971, it was a scramble to get our plants up to capacity so that we could ship just as much wallboard as we could make, because the demand had changed that radically, and we had the opportunity to sell everything we could make.

By Mr. KECK:

Q. I understand you became president in February, 1971. What was the second quarter in '71 as contrasted to the first full quarter after you became group vice president?

A. I mentioned earlier that in 1967—that we had worse quarters after I came, in industry share, after I became group vice president; so I had at least one fortunate [12,480] circumstance, in that the market did turn up for me in 1971, and I was very pleased about that.

Our industry share did increase as we shipped our product at full capacity of our plants. We made some incremental investments in added capacity. We were shipping full in 1972, and, in 1973, our industry position went down, but that is a function more of the percentage of the productive capacity that we had at those points. And if you will notice that during 1971 and 1972, our realized price did improve.

I would like to talk about the costs in this period from 1963 through 1968. As a company, we were able to hold our cost quite level. At times, we were able to reduce those costs or had moderate increases, but the trend was fairly level, and we accomplished that through large investments in machinery and in equipment to increase our productivity and our efficiency. Then, of course, we were stimulated to do that by the price situation that we had experienced back in here, so that we were trying to keep our costs down, and we were able to overcome the inflationary influences during this period.

However, from 1968 on—you can see an increase in 1969, a larger increase in 1970, a little bit of a decline in '71. As our volume increased, we were producing more units, and then the inflationary influences of 1972 and 1973. [12,481] Those are the largest increases in cost our company has ever experienced. We have the problem that the gypsum industry's prices were controlled, and, therefore, could increase moderately. We were able only to pass through cost increases that we experienced, but the regulation was such that you had to experience the costs first; that is, you had to have had them, then you made application to the Government for the ability to pass those costs through or increase them.

There was a natural lag time during which you didn't get the price, and so these costs impinged on our ability to improve our realized price.

Q. Mr. Duffy, at the end of 11 years, do I read this correctly that your realized price was 15 percent below where it was in 1963?

A. Yes, 15 percent.

Q. And your market share was——

A. A little over 20 percent, about 21 percent.

Q. And your average cost for that had gone up——

A. To about 23–24 percent.

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[12,488] Q. Now, on Friday, you also testified that you took Robert Evans to Los Angeles in September, 1967, to introduce him to his new position as division manager of the western division, and, at that time, you learned how deeply your competitors had cut into your business and how much of it you had lost. And you testified that you were both "shocked and surprised," at what you learned.

Now, my question is, did you have any basis for that shock and surprise by reason of your prior duties?

A. Well, in 1961, when I was general dealer sales manager and then, again, from 1963 until 1966, I was Vice President of Sales, and, in those capacities, I made frequent trips to the west coast with our salesmen, called on our customers, talked with our sales managers, reviewed the company's status and performance in that area, as it related to sales, and I was well

aware of what our position was in the market in all of those years.

Now, during the years '66 and '67, I did not have responsibility for the—for our western division, but I was intimately acquainted with the market in the years prior to 1966.

Q. You testified, Friday, also, that, in the fall of 1967, you were in the process of stimulating your sales force, turning it around, I think you said, after a period when you thought it has lost some of its vitality. Would you [12,489] tell us why your sales force had lost its vitality prior to November, 1967?

A. During 1966 and '67, until approximately midyear, we were meeting very few competitive prices in the field, and, under these circumstances, it stands to reason that the sales force tends to relax. They got the attitude that, "Well, the company is not going to meet competitive prices I find in the field," and, therefore, they sat back, "So what?" and were not as vigorous and aggressive as they had been previously.

In addition to that, you know, we published the fact that we were not meeting the lower prices of competitors to our customers. We told them that we were going to sell at our published prices only; and, under those circumstances, our sources of information from the customers tended to dry up, because they felt it was useless to tell the USG salesman what the competitive prices were, because he wasn't going to do anything about it anyway. So it was necessary that we restimulate the sales organization and convince them and our customers that we were going to be vigorously competitive and sharply competitive in the market.

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[12,490] Q. Now, in discussing the chart on the easel just before the close, on Friday, you testified about a dramatic upturn in housing starts and the demand for gypsum wallboard in March, 1971.

Can you tell us an approximation of what the housing starts were in 1971, as compared to 1970?

A. Well, the housing starts in 1970, as I recall, were about 1,400,000 starts. In 1971, the starts were 1,200,000—or 2,100,000, for a very dramatic upturn, about 40 percent, as I remember, if my mathematics are good.

[12,491] By Mr. KECK:

Q. Do you recall what percentage housing starts were in 1972 over 1970?

A. Well, 1972 was the record year of housing starts ever experienced in the United States.

The housing start level was about a million four hundred thousand, slightly less than that, and as I remember, about 60 percent higher than 1970.

You know, I mentioned the two million one hundred thousand housing starts in 1971, and that was the highest level of housing starts experienced in the United States for 20 years, more than 20 years, I guess.

The last highest starts figure that I recall was 1950 and I think that was slightly under two million.

Q. What were the housing starts, as you recall, in 1972?

A. Two million four hundred thousand, slightly less than that.

Q. Friday, near the close, Mr. Duffy, you testified that in 1973 your company was shipping full out, but your industry position went down, went down.

And you said in that connection, that that was—and I am quoting—"A function more of the percentage of productive capacity than we had at those points".

Would you tell us what you meant by your industry [12,492] position in 1973 being more of a percentage of productive capacity?

A. Well, during 1971, '72 and '73, because the demand was so heavy, U. S. G. made incremental increases in its productive capacity. By that I mean we added capacity to plants already in existence, added equipment, machinery, lengthened the kiln, to increase the drying time, increase the capacity of some of the machines already in existence.

We were making and shipping everything we could manufacture.

It is obvious, under those circumstances, that our competitors must have followed a similar procedure, but in the total added more capacity than we did.

And therefore, at those points of time, since we were shipping everything that we could make, that represented our percentage of the productive capacity in the country or very near to it.

Q. Now, U.S.G. Exhibit 654 indicates at the bottom, as was pointed out Friday, that price controls became effective August 15, 1971.

Were your basic costs controlled as your gypsum product prices were?

A. Well, not as to the—no, no, our costs were not controlled. Some of the things that we bought in order to make gypsum board, bought from other people, were not under the [12,493] price control program.

Waste paper, for example.

All of the paper that is used on gypsum board is recycled or waste paper and it always has been. During the period that we are talking about the general economy of the country was very strong and many of the paper companies were beginning then to use recycled paper.

I think you will remember that was a popular idea. It was something the gypsum board industry had been doing for a long time and this created additional competition for the supply of waste paper and waste paper was not controlled, so there was certain grades that went up 150 percent and certain grades of hard stock or strong stock that went up as much as 300 percent and we had to absorb the majority of the cost, because we were under price control and not permitted to do more than pass through the increased costs, and then we had a substantial lag time.

Q. How did you cope with these increased costs of waste paper?

A. We didn't cope with them. We paid the prices in order to have paper to make board.

Q. Mr. Duffy, I would like to call your attention to this green line drop from 1963 to 1967, which is your market share, that fell off over—nearly 25 percent in those period of years and ask you if it is correct that the [12,494] market share of all gypsum producers equals 100 percent?

A. Yes.

[12,495] Q. Then this loss of percentage would mean, would it not, that the reciprocal of that went to your competitors?

A. Yes, what we lost, our competitors gained.

Q. Now, referring back briefly to the second 1965 strategy testified about Friday, did you participate in the internal

deliberations in your company that led to the adoption of the policy that became effective December 15, 1965?

A. Yes, I was a member of the committee that assisted in forming the recommendations, attended many meetings and discussions on that subject that led to the eventual decision on the part of the company.

Q. Do you recall whether it was considered by your company that if it stopped discounting and meeting single-plant competition, that your company would lose some business, some market share?

A. Definitely. There were estimates made of how much industry share the company might lose under those circumstances. They were projections, of course. The feeling was, on the part of the management, there would be loss, perhaps substantial loss, in the early stages. There was hope that we might recover that in time and that, in total, that the balance between realized price and industry share would be a favorable one for the company.

Q. Do you recall how you felt personally about that [12,496] second 1965 strategy, Mr. Duffy?

A. I reluctantly concurred in recommending it.

Q. Why were you reluctant?

A. As I indicated previously, my background and experience had been in sales work. I was vice president of sales at that time. I was concerned about potential loss of business to the company. We had no way of knowing what the competitive reaction would be to the program we were launching. I had very little confidence level based on the activities of the competitors in the marketplace prior to that, that they would follow our leadership or adopt similar programs, and I was concerned about the loss in business.

Q. Well, if you were reluctant, why did you concur in the recommendations?

A. Well, it—at one of the meetings, I recall, I voiced my concern and reluctance, and our general counsel, Mr. Charles M. Price, who was also a director of the company at that time, indicated that we had tried everything else and it had not worked, and he asked me if I had a better idea, and I didn't have a better idea. So I went along with it.

Q. Was it customary in your company, Mr. Duffy, to include lawyers in meetings regarding proposed changes in pricing strategy?

A. Yes, that was very usual.

Q. Why was that done?

[12,497] A. We were anxious that the considerations and decisions of management would be lawful.

Q. I assume the lawyers did not make your pricing decisions for you?

A. No, those are management decisions.

Q. Incidentally, do you recall whether you were present when the idea of setting up a job protection register at Arthur Anderson and Company was considered by your committee?

A. Yes, I was present, and I do recall—recall that. The matter of job protection has always been a probem in the industry, and it was certainly a problem in this circumstance. There were many discussions about it in our meetings. Our sales people had made commitments to our customers in good faith that they would protect these jobs. I was very an ious that these commitments be fulfilled. The company had always fulfilled its commitments in the past, and I knew, too, if we did not fulfill them, we would lose the business that was involved with those customers, and perhaps lose a customer, either permanently or for an extended period of time.

I mentioned that protection was a problem, and it was. You see, it was the habit of some of our clever customers to list their protected jobs with two, three or more of the gypsum companies, and this worked a hardship, as far as we were concerned.

I will give you an example. Suppose there was a [12,498] job involving one million feet of wallboard, on which we had quoted and committed to job protection. Well, now, if the customer also listed that job with two of our competitors, manufacturers, this gave him three million feet that he could ship on that job. Well, when he finished shipping the million feet that we had protected on that job, then we were deprived of the opportunity of selling him the other two million feet he had protected, because he would begin to buy those from the other two manufacturers.

In addition to that, he would buy that material, the extra two million feet, put it on other jobs in the same city. This would

mean our other customers in that city were not able to sell against that lower priced material, and so not only was he cheating USG, he was cheating the other dealers and the customers and, in fact, was cheating the other manufacturers, so it was a problem.

[12,499] By Mr. KECK:

Q. Whose suggestion was it, if you remember, that the register of your job protection commitments be filed with Arthur Anderson?

A. It was the suggestion of Mr. Price, our general counsel. He indicated that as long as we were going to honor these commitments, that we might as well do it openly and list them with this independent agency, the auditing firm, and do it out in the open.

Q. In addition to considering changes in pricing strategy, were the lawyers usually consulted on your major list price changes?

A. Yes, always.

Q. Now, you have testified about the success or lack of success of your company's pricing strategies as regards gypsum wallboard between early 1960's and 1973. Has U.S. Gypsum ever considered as a strategy entering into any kind of price fixing understanding or agreement with any of its competitors?

A. Never in my experience.

Q. Have you or anyone else at your company, to your knowledge, ever been a party, a part of or a party to, any understanding or agreement with a competitor as to future prices of gypsum products or terms and conditions of sale?

[12,500] A. No.

Q. In the various meetings you have attended within your company where price strategy or list price changes have been considered, has anyone ever said either that he had an understanding or agreement with a competitor regarding prices or that he thought the company should try to obtain the understanding or agreement of any of its competitors?

A. Never.

Q. Has U.S. Gypsum every disregarded or acted contrary to the advice of its legal counsel in adopting any pricing strategy or major list price announcement?

A. Not in my experience.

Q. What does your management use as an indicator of the net price at which it is selling, for example, its half-inch gypsum wallboard nationwide at any given point in time?

A. Net realized price, sometimes called mill nets.

Q. That is the basic indicator that you use?

A. Yes.

Q. Why is that considered a good indicator?

A. It indicates the fluctuation in our prices.

Q. I show you, in the absence of the jury seeing it, a chart that has been marked USG 656 and ask you if you can identify that chart?

A. Yes, it is a chart comparing half-inch gypsum [12,501] wallboard, industry average price, with some selected other commodities. It is an index chart so that these can be compared on a direct basis.

Q. What year is used as 100 per cent?

A. Well, 1960 is used as 100 per cent. That is a base year. Then all other years are compared to that.

Q. Now, what other commodities are compared to half-inch wallboard, industry-average price?

A. Well, this chart compares softwood plywood, footwear and hamburger.

Q. And what is the source of information shown on the chart for half-inch gypsum board, industry-average price?

A. The Bureau of Mines' report.

Q. Reports from the Bureau of Mines?

A. From the Bureau of Mines.

Q. And what was the source of the information on softwood plywood?

A. Bureau of Labor Statistics.

Q. And what about footwear?

A. Bureau of Labor Statistics.

Q. And hamburger?

A. Bureau of Labor Statistics.

Mr. KECK. I offer in evidence USG Exhibit 656.

[12,504] • • •

[Defendant U.S. Gypsum Exhibit 656 was received [12,505] in evidence.]

By Mr. KECK:

Q. Mr. Duffy. I direct your attention to U.S. Gypsum Exhibit 656. Would you explain to the jury what that chart shows?

The WITNESS. May I step down, Your Honor?

The COURT. Certainly.

[12,506] The WITNESS. Where we talked about index charts the other day, Friday, this once again is an index chart with the index or percentages shown on this side, and the years 1963, '68 and '73 shown across the bottom.

We used 1960 as 100. So, if you keep in mind this line at 100, each of the fluctuations of the bars relate to the percentage increase or decrease from this 100 line for the year 1960.

And you get a direct percentage reading from looking at the chart; and direct percentage reading—the difference between 100 and 110 is 10 percent, 120, and so on.

Why don't I take gypsum board first. Comparing the price of the industry price of half-inch gypsum board for 1963 with 1960, you will see that the price of gypsum board in 1963 was slightly higher. I believe that the index was about 103 or 104 percent.

In 1968, reduced realized prices in the industry, so that the index now had declined about 12 percent to 88.

And then in 1973, further decline in the price, realized price of gypsum board. So that at that point in time it was about 16 or 17 percent below the 1960 level.

By comparison, softwood plywood in 1963 sold for less than it did in 1960. By 1968 it had risen to about [12,507] 14 or 15 percent above the 1960 level, and then increased very sharply in 1973 to a point about 70 or 71 percent above the 1960 price.

On footwear, the price in 1963 slightly above 1960, up about 22, 23, 24 percent in 1968.

In 1973 it had risen to about 153 or 154 percent of the price in 1960.

And the food item, hamburger, slightly less in 1963 than it had been in 1960, up about 8 percent, 7 or 8 percent in 1968. And then, a very sharp and dramatic rise to about 185 percent of the price that existed in 1960.

The trend in gypsum board is very obvious, I think. The level of gypsum board prices at this point represent a considerable bargain, because gypsum board is selling for right about two cents a pound at that level.

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Q. Do you know of any other building materials produced by your company that have experienced a decline in price as great as gypsum wallboard over the period 1960 [12,508] to '73?

A. No.

Q. As an executive in this building and construction field, do you know of any products used in that field of a commodity type—whether or not manufactured by your company—that have experienced a decline in price like that of gypsum wallboard over the same period?

A. I am not aware of any.

Q. Do you know of any commodity products of any kind that have experienced as great a decline in price as gypsum wallboard over this period?

A. No. I am not aware of those either.

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CROSS-EXAMINATION

[12,512] • • •

Q. But you are aware of Republic Gypsum; aren't you, Mr. Duffy?

A. Yes, I am.

Q. Because you probably traveled down in the Southwest when they came on stream and inspected the situation—did you not—like you did on the West Coast?

A. No. I did not inspect Republic's plant, if that's [12,513] what you mean.

Q. But you went down to see what they were doing and what was going on; did you not?

A. I made trips into the market to maintain an awareness to the market and a sensitivity to it from time to time in all parts of the country.

Q. Because, isn't it fair to state, sir, that whenever a new plant such as Republic Gypsum plant—that seems to have some aggressive people running it—comes on stream, it is of some consequence to United States Gypsum?

A. All competition is of consequence to United States Gypsum.

Q. Well, isn't an aggressive single plant producer in the Southwest maybe of a little bit more significance than if Georgia-Pacific say just adds another line someplace?

A. I can't think of anybody more aggressive, nor more troublesome, than Georgia-Pacific.

Q. How about Texas Gypsum, sir, between 1960 and 1964? Didn't you have a war zone down there?

A. Not that I recall.

Q. So, when you were competing against Texas Gypsum, the Huckleberry operation, and you were dropping the price by $6 a thousand, giving unloading allowances, opening [12,514] up warehouses, that wasn't a war zone; is that right?

A. Well, my recollection of this industry, and my experience in it, sir, is that it has been a war ever since I have had anything to do with it.

Now, Texas Gypsum might have been a skirmish, but it wasn't a war.

• • • • •

[12,539] • • •

Q. Do you know of your own recollection, now, sir, how prices compared in the southwest as compared to the northeast?

A. The southwest, at times, was a much more competitive area. It was an area where the producers had a relatively low cost, lower cost than they had in the northwest, certainly, and so that on a general basis, it can be said that the prices in the southwest tended to be lower. Now, I—but I can't equate that to the specific point of time that you are referring to.

• • • • •

[12,540] Q. With respect to the document that you received from Mr. Morgan, did you, from time to time, follow a procedure whereby you contacted your competition concerning prices and terms, and they, in turn, contacted you?

A. No.

Q. You didn't use it, then?

A. I didn't feel, in the first place, that that document provided authority for me to do so.

But, at any rate, I did not contact competitors with relation to price verification, nor did I receive calls from them regarding price verifications.

Q. Now, you were in a position of, certainly, with substantial authority over the prices of gypsum wallboard, were you not?

[12,541] A. At what point in time?

Q. From at least 1963, when you were general sales manager, through 1973.

A. The pricing policy responsibility in the company rested in the—in the pricing policy department, and people in sales, in line management, made recommendations or discussed matters and made, gave advice relative to prices, but were not the final authority. Our advice was sought and given.

Q. Well, didn't you, from time to time, have to pass on whether or not competitive deviations would be met or not?

A. Yes.

Q. Now, did anyone working for you contact competitors with respect to prices and terms, and, in turn, were contacted?

A. In what period?

Q. 1963 through 1973.

A. Well, I learned in this courtroom, for the first time, that, while I was general sales manager of the Central Construction Products Division and Mr. Galvin reported to me, that he made several such calls. I was not aware of it at the time.

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[12,542] Q. While Mr. Galvin worked for you, he was exchanging information with competitors, and you didn't know about it?

[12,543] A. That is correct, 1966 and part of '67.

Q. If it was your policy, as you have indicated, not to meet competitors' deviations in 1966 and '67, why was he doing this?

A. I don't know why he was doing it.

• • • • •

[12,544] Q. Immediately prior to the recess. I had been asking you a series of questions concerning your knowledgeability concerning those within the organization—particularly Mr. Galvin—who were exchanging prices and terms with competitors. Do you recall that?

A. Yes, I recall your questions.

Q. Now, sir, to your knowledge, do you know who else within the corporation—if any—were exchanging prices and terms with competitors for the period from 1960 through 1973?

A. Well, those responsibilities were held in our merchandising and pricing and policy group at that time. There were changes in personnel during that period. And I don't believe I could tell you everyone who had the authority to verify prices, but I do know some of them from time to time.

Q. Well, can you count the ones that you do remember, sir?

A. Yes. Mr. Galvin. Mr. Evans. Mr. Gimlin. Mr. Baldwin. Mr. Watt. Those, I recall.

Q. How about Mr. Morgan, the president?

A. Well, now, Mr. Morgan received his authority from the [12,545] Board of Directors. He didn't share with me all of the authority that he was given, but I believe that he had the ability to do that.

• • • • •

[12,549] Q. All right. Now, with respect to your—the time period 1960 through 1973, now—directing your attention to that, when you had line responsibility at all times—did you, from time to time, ever have to approve or disapprove [12,550] a competitive situation?

A. Are you talking about a report of a competitive situation from our field people?

Q. Yes.

A. Yes, I did.

[12,551] By Mr. FRICANO:

Q. Did you approve or disapprove on a green sheet—is that what you used?

A. Yes.

Q. Did you from time to time give your approval—I withdraw that.

When you gave your approval, were you satisfied with the market intelligence which you received?

A. Yes, I was satisfied that the information was sufficient for me to recommend that the company meet that competition.

Q. And where did the green sheets go from you; I mean, where did it travel through in the organization; did it go over to Merchandising?

A. I should probably clarify this line of questioning. I said previous that I had responsibilities for gypsum wallboard begin-

ning in 1961. The jobs that I have had, the line jobs that I have had, have all been high-volume jobs. Green sheets and price adjustments did not come to me routinely from the field organization. If that had been the case, I would have been buried in them because through this period they fell like green snow. And so that the distribution was such that they routinely went from our sales people in the field to our price and policy people.

[12,552] Now, the only time I would see one would be if it was a particularly significant situation with a large account, or it might be with an account that I had personal acquaintanceship with, or it might be one that contained some kind of an unusual problem, or something like that. So I didn't see masses of green sheets.

Q. Now, you sent your approvals in such situations, when you did, you sent them on to Price and Policy; did you not?

A. That is right.

Q. And sometimes they agreed with you, and sometimes they disagreed with you, correct?

A. Yes, more often agreed. Sometimes they would indicate that we should dig deeper, try to get more information from the field.

Q. Did you know why at those times they wanted you to go back and ascertain whether or not there was additional information in the marketplace upon which they could base a judgment?

A. Not always. Some would just come back with a note that said, "The information incomplete. Feel you should provide more information for our decision."

On a few occasions, through the years, it has been said to me that there was an attempt to verify this with a competitor, verify that the price had been made, [12,553] and they thought I ought to try to get more information from my field organization.

Q. Yet you were satisfied at the time you gave your approval, were you not?

A. Well, if I had not been, I would not have given my approval.

Q. Now, you say these green shets fell like snow throughout this time period. Did they fall like snow in '66 and '67?

A. Yes, although the snow was a little higher than it had been at some other time because, as I indicated, while we encouraged our sales organization to continue to try to find out as much as they could in the field about competitive prices, and they did in fact find a good deal of information out, their ability to get that information lessened, and their motives to get that information lessened, when we were not broadly meeting competitive situations.

I think it is easy to see how salesmen get discouraged under those circumstances.

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[12,557] Mr. FRICANO. Excuse me. I am corrected again. 302–A.

By Mr. FRICANO:

Q. Would it be fair to state, sir, if United States Gypsum had elected to show 1966 on that chart, that the [12,558] bars would have been even narrower than the ones in 1967?

A. Do you mean shorter?

Q. Well, I guess shorter would probably be the most precise statement.

A. They are not included, and I don't have the figures in my mind, of course, but I would think that they would be fairly shorter.

• • • • •

[12,559] Q. • • • Now, were '66 and '67 good years or bad years as far as housing starts were concerned, as compared to 1965?

A. As I recall, 1966 and '67 housing starts declined from 1965.

Q. 'nd then they picked up again a little bit in 1968?

A. That is my recollection; '68 was a better year.

Q. Now in 1965, could we characterize it—and if I mischaracterize it, Mr. Duffy, please correct me—could we characterize 1965 as a period of competition in the gypsum industry as compared to 1964?

A. They were both periods of competition.

Q. The degree of competition was greater in '65 than it was in '64?

A. It has always been bad, and I suppose you could say that, yes, sir, if you chose to. They were both severely competitive periods.

• • • • •

[12,569] Q. Is it your testimony then that if a salesman were to say to a customer that we now have a job price protection list in the hands of our auditors which show exactly what jobs we have price protection on, and your jobs are included among them, but the fact is that our competitors have access to this information, would prove that the customer was a liar?

A. Well, I don't know, Mr. Fricano; I don't understand your question.

Q. I am sorry, sir. I didn't understand your answer, so I guess that's where the confusion lies.

But the fact is that you did pull together all the jobs that you conceived should be protected, you did put them in the hands of Arthur Anderson, and you did notify the chief executive officer of each of your competitor companies that this information was in the hands of your auditor and it was available to them?

A. Yes, the company did so. You said "you." I presume you don't mean me personally, but the company.

Q. Yes, the company.

A. Yes.

Q. And this was pursuant to Mr. Price's wanting to have things out in the open?

A. Yes. It was Mr. Price's suggestion.

[12,645] ANDREW J. WATT called as a witness by and on his own behalf, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bartlit:

Q. Mr. Watt, according to the stipulation, Government Ex-

hibit 7, in this case, as of December, 1973, you were an executive vice president of U.S. Gypsum. Do you still hold that position today?

A. Yes, I do.

• • • • •

[12,652] By Mr. Bartlit:

Q. Now during the period of time beginning in 1958, when you were a vice president advertising and promotion, did you have any responsibility regarding prices and pricing policy?

A. No, sir, I did not.

Q. It is true, then, that your responsibility for prices and pricing policy during this hitch with USG ended in 1958, when you became—got in the advertising and promotion field, is that right?

A. That is correct.

Q. Now we have got you up to 1958, where you are vice president, advertising and promotion.

How long did you stay in that position?

A. Well, until I announced my resignation on December 1, 1960. I stayed through the month of December at the—well, I gave a month's notice, so I stayed through the month of December.

Q. So you left U.S. Gypsum the first of 1961, then, is that right?

A. That is correct.

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[12,654] Q. And did you come aboard at Masonite, so to speak?

A. Yes, I did.

Q. In the job of vice president, marketing?

A. That is correct.

Q. How long were you employed in that capacity by Masonite?

A. Well, the total employment period, including the period I was really working as assistant to the president, was just a little more than a year.

Q. When did you leave Masonite?

A. In, I guess, the end of January. I think I might [12,655] have had a couple of weeks off the end of January and returned to USG early February, 1962.

• • • • •

[12,657] Q. What were your duties and responsibilities when you went back with USG in February, 1962, as vice president, marketing, Mr. Watt?

A. Well, the—we have had a lot of talk and, somewhat, confusion about line and staff.

It was a line job, in terms that the entire sales organization reported to me through a vice president of sales. The merchandising department reported to me, market research, capacity planning, advertising and promotion, and I am not sure, but I think there was one or two small subsidiaries that we had acquired which, for lack of another place to put them, they reported to me at that time.

Q. Now, when you—you testified, Mr. Watt, that, when you became vice president, advertising and promotion—and, from that time until the time you left U.S. Gypsum in early—in late 1960, you didn't have any responsibility for prices and pricing policies.

Now, you are back at U.S. Gypsum in February of 1962.

Did you have any responsibility, when you returned, for recommending pricing strategies?

A. Yes, I did, as vice president of marketing.

Q. So that was a change over the position you had had just before you left, a year or so ago?

[12,658] A. That is correct.

Q. Okay. Now, can you briefly tell us whether there were any major changes in your overall duties and responsibilities, from the time you returned in 1962 until the end of the year, 1973?

A. Yes. I will stick to major ones.

As I indicated, during this period of time, we were making some acquisitions and, off and on, smaller units would be assigned to someone, but I will skip those things and just deal with the major ones.

The first major change was in 19— well, it was effective January 1, 1966, where the sales department—well, we reorganized the whole company, at that time, and formed it into profit centers and divisions, and I gave up the line functions. In other words, the sales department became part of the reorganized divisions.

I kept the—all the rest of the marketing staff functions—merchandising, promotion, advertising, marketing research, capacity planning, that sort of thing.

That was the first big change. Then, we continued to look at our organization, and we continued to expand and diversify, and, in the fall—I think it was September of '67, I was named—well, somewhere in there—I was made senior vice president of marketing, but, in the fall of 1967, my title became senior vice president, and, at [12,659] that time, in addition to my marketing staff functions, I took on what we tend to generalize as operating staff functions.

These included engineering and mining and exploration, manufacturing, quality control, labor relations, a couple of others that I have forgotten at the moment.

Q. Have you been pretty much a staff man, as opposed to a line man, since the reorganization in 1966?

A. Yes, I would say so.

Q. Now, with regard to your responsibilities during this period, 1966 through 1973—and, Mr. Watt, unless I say otherwise, you can assume, in my questions, when I am talking about your tenure at USG, I am going to start with my questions from the period when you came back, in February, 1962, so you can assume I am talking about that period, unless I say otherwise.

A. All right.

Q. During the period I have just described, did you continue to have responsibility for recommending price and product strategies?

A. Yes, I did.

Q. Did you have, during that period, at any time, Mr. Watt, final decision-making authority on major pricing changes, either major pricing strategies or major printed bulletin price changes?

A. No, I did not have final authority.

[12,660] Q. Who would have—what final approval would be required on such major pricing decisions?

A. Well, the—from time to time, as the structure changed, it would include executive vice president, president, and the chairman of the board.

Now, as we changed our organization, those levels changed, but it did require the approval of the chief executive officer, whatever his title was.

Q. Let's take the period of—was there ever a period of time when approval of the Board of Directors or the Executive Committee was required for any particular price change or change in pricing strategy?

A. Well, of course, we frequently reported to the Board of Directors on pricing, but I only remember the one occasion where a proposal was taken to the Executive Committee.

The Executive Committee acts in behalf of the board, in between regular board meetings, and so it was approved by the Executive Committee and then referred to the full Board of Directors for ratification, but the Executive Committee approved it.

Q. And when was——

A. But that—I am sorry.

Q. Excuse me. When was that occasion that you just told us about?

A. That was in connection with the price change on [12,661] gypsum wallboard, which was announced in November of 1965, with an effective date of December 15, 1965.

Q. Do you recall what the reason was for going to your Executive Committee to get approval for a particular price change?

A. Yes. We had come through a number of different strategies with respect to gypsum wallboard. There is a limited number of things you can do with price, but we felt that there was a potential risk in the decisions we were making at that point, in terms of loss of profit, and I think it was—well, it was certainly the opinion of everyone that this possible risk should be shared with the Executive Committee and the board. That is who we worked for, and—well, I think we were trying to share the responsibility a little bit.

Q. Now, you have told us about your duties over the period of time after you came back to the company. In those duties,

did you have occasion to work with your attorney, with your counsel, Mr. Watt?

A. Yes, I did, frequently.

Q. Can you tell us—and we don't want a lot of detail. We want to get a feeling for it.

Can you tell us the kind of areas in which you had occasion to work with your company's lawyers?

A. Well, marketing and, certainly, staff marketing [12,662] gets into so many things—you start with product. You have situations where product liability or the claims that you will make that the product will do—this affects the literature you print, the labels you put on it. Certainly, in price and policy, with respect to all the antitrust laws or any of the laws that affected price and policy, we got into—as my responsibility expanded, we got into such things as—well, labor relations, consulting contracts, selling contracts—that is, contracts we signed, where we sold people, including competitors.

It is quite a long list.

Q. Mr. Watt, were you one of the principal officers of the company, who was delegated the job of working with counsel in some of these areas that you have told us about?

A. Yes, I was, because of the nature of my responsibilities, which included all staff, except for, perhaps, financial, with as many laws as we have to keep track of—and I am not a lawyer. It generally came back to me, as the chief or senior staff officer, that I was involved in some way.

Q. And did you have occasion to discuss with your counsel both broad policies and specific, little problems?

A. Yes, both.

• • • • •

[12,673] Q. You have heard Mr. Duffy's testimony, the last part of last week and today, regarding the various price strategies that U.S. Gypspm attempted over the period of time; do you recall that, Mr. Watt?

A. Yes, sir.

Q. Is your recollection of your experiences with USG consistent with Mr. Duffy's statements and testimony regarding the various price strategies that were tried at the [12,674] company over this period of years?

A. Yes.

Q. In what way, Mr. Watt, is your recollection of the testimony of Mr. Duffy and these other men regarding what happened during these period of years consistent with your experience in the company?

A. Well, of course, I have been close to it, reasonably close to it, all these years, and I think I could best describe it in terms of phases or time periods.

May I do that?

The COURT. Yes. Do it without referring to the testimony of anybody else.

The WITNESS. Yes.

By Mr. BARTLIT:

Q. Yes, and we referred to a lot of this, Mr. Watt, and, at least so far as I am concerned, if you can summarize it, that would be the best thing.

A. I think I commented a littl earlier that there are only so many things that you can do with price. You can raise it; you can lower it; and I guess you can be stubborn about it and just keep it the same. And I would describe the period that we are talking about here, and with relation to gypsum board, as going through a phase of defensive pricing, where we were chasing the other fellow. That started, and—well, there was some of it when I came back [12,675] in '62. It accelerated in '63; it accelerated more in '64; and in '65, we changed the strategy, and I called it, rather than being defensive and trying to chase the other fellow, I called it aggressive.

And we went through that for a while. And we gave that a chance to see if it would work, or in terms of improved profits, and it didn't.

Then, we went into the third phase, which was the phase that we established in December of 1965. And when I say that the third type of action you can take is being stubborn, that was not my words. That was applied to me when I wouldn't stay in there with that approach.

Now, those things from then on, regardless of what strategy we tried, the prices went on down, and, as far as I am concerned, the earnings of the gypsum business went down. The gypsum board business went down, as well.

[12,676] By Mr. BARLIT:

Q. Mr. Watt, have you ever in your entire career with USG,

both before you left and after you came back, have you ever entered into any understanding or agreement with any competitor to fix, stabilize or maintain prices of gypsum products?

A. No, sir, I have not.

Q. Now, you have described, and Mr. Duffy described, and other witnesses have described the conditions which the company has faced over the period of years. There is evidence showing the market share went down, evidence showing that the realized prices went down, and the list price went down, and you told us the profits went down.

Did you ever consider, Mr. Watt, in an effort to solve the problems that we have heard about in this courtroom, did you ever consider entering into an agreement with one of your competitors to set or fix the prices at which gypsum would be sold?

A. No, sir, I did not.

Q. Why didn't you do that, Mr. Watt? Wouldn't that have made your job easier, and wouldn't it have been better for your company; couldn't they have made more money if you had done that?

A. I don't think the company's earnings are that important to me to violate my own principles. I have lived [12,677] an honorable life. I have not disobeyed those laws. And that is the reason I didn't ever consider it.

Q. Were you aware during this entire period of time, Mr. Watt, that it was a violation, a criminal violation, of the Federal antitrust laws to agree on price with a competitor?

A. Yes, sir, I was.

* * * * *

[12,678] Q. Now, again, I don't want to spend the time of this trial going into every conversation you had with anybody on this subject over a period of years, but if you can, would you please summarize any other facts that come to your mind on which you base your knowledge throughout this period of time that price fixing was illegal, Mr. Watt?

A. I would say that—well, I will be brief about it. But there was one situation that sticks in my mind particularly. When I moved from New York City to Chicago, our headquarters, and I had been in a job involving paint [12,679] products for a while, but I was put in as an assistant to the

vice president of sales for a period or so for some training, and as such had the opportunity to attend some association meetings.

The first one I attended was not a Gypsum Association meeting, but another one. But at any rate, he and Mr. Price sat me down and told me in detail about both the Robinson-Patman Act and the Sherman Act.

And the thing that stuck in my mind, and again I am not a lawyer and I am not going to repeat the laws at this point, but they said, "Remember this, that the Robinson-Patman Act"'—and then they told me the principles: You can't position; you can't tie in; you can't discriminate; and so on and so forth. "If you disobey that, it can cost the company a lot of money, and you can lose your job."

When it comes to the Sherman Act, we went through that with the key thing being that you cannot agree with a competitor, that you cannot only cost the company a lot of money and lose your job, but you can go to jail. And that stuck with me.

• • • • •

[12,680] Q. Has there ever been any question in your mind, Mr. Watt, throughout this entire period of time from 1938 until the present day that it was illegal to fix prices or agree with competitors on prices that were going to be charged for the product?

A. There has never been a question in my mind regarding that.

Q. Mr. Watt, there has been testimony in this trial regarding price verifications. Did you have occasion to personally verify prices at any time after you came back with U. S. Gypsum in February 1962?

A. Yes, I did.

Q. Now, why did you do that, Mr. Watt?

A. Well——

Q. What was your purpose? Excuse me.

A. Two reasons. It had been explained to me without any question that if I had a request, a recommendation from the field organization for a price, to meet a competitive price, and that in order to comply with the good faith section or the good faith defense of the Robinson-Patman Act that it was completely legal for me to seek that information where I could get it, and, properly handled, I could ask competitors what their price was. So I did it for that reason.

[12,681] The second reason is that I had been in sales and marketing and I had a lot of different capacities during my experience. And I was aware that buyers did mislead sellers occasionally. And so I verified to prevent being misled by somebody that was perhaps stretching the truth.

Q. Did you, Mr. Watt, ever have any understanding or agreement with any competitor to verify?

A. No, sir, I did not.

Q. Did you have any understanding or feeling that you were obliged or committed to answer any such inquiries which might come from a competitor?

A. No, I had no obligatory need to do it. It was my choice. That is why I felt it was not an agreement.

Q. You testified a moment ago, I believe, that you were advised by counsel regarding the verification practice. Did the lawyers ever tell you the basis for verification?

A. Yes, to——

Q. What—excuse me.

A. To prevent discrimination under the Robinson-Patman Act.

Q. In any of these verification contracts, Mr. Watt, did you ever refer to or discuss the future prices of either U.S. Gypsum or the particular competitor you were talking to?

A. No, sir, I did not.

[12,682] Q. Now, during what period of time did you personally verify with competitors?

A. Oh, I verified in 1962 because there wasn't much of it then. I mean, there wasn't as much need for it.

In '63 I know I did some verifying.

In '64 I delegated most of it. I would say it was pretty rare then.

The early part of '65 I might have had some calls or made some, but by that time most of that was being handled by others. And in June '65 when we adopted a different pricing philosophy, we were moving to drop prices, so I wasn't—no one to my knowledge was doing much verifying then. I stopped personally verifying when I took on the additional responsibilities in the fall of 1967. I had quite a bit of learning to do.

I had spent all my business career in marketing, and I had to learn about some of these new things that were reporting to me. So I just delegated it out completely.

Q. After you assumed these new responsibilities in October of 1967, Mr. Watt, did you have less day-to-day contact with the marketing situation out in the field?

A. Well, that was the problem. I was, as I said, getting more involved in the operations end of the business and learning a lot about it, or trying to, and I just was too far removed to be a good judge of what was happening in [12,683] the marketplace.

[12,684] By Mr. BARTLIT:

Q. Okay.

Now, let's take the period of time between 1962 and the fall of 1967. This is the period of time in which you said, from time to time, you were personally engaged in these verification calls.

I would like you to explain to the Court and jury, if you will, Mr. Watt, the context in which these verification calls came about; that is, what would be the fact situation that would give rise to your making one of these calls; how would you decide?

I take it that sometimes you met the price; sometimes you didn't; sometimes you would meet the price and call; sometimes not call; but just, in your own words, tell the Court and jury the circumstances that took place during this period of time.

A. Well, my personal verification, of course, was usually the result of someone bringing me a report from our organization that a certain situation existed in the marketplace. In other words, a competitor had made such-and-such an offer. The decision as to whether to verify or not, with many of them, it was just because we had good evidence, and it just got approved. But the ones that came to me, there might have been a question on, either a question of economics, because, sometimes, you would look at it and say, "Well, [12,685] even if we get this business, we are not going to make any money," and you then turn it down; and, occasionally there would be one that it is profitable, it looks like an economically sound thing to do. The story doesn't go together. I mean, there is not enough here.

In many of those cases, I just simply sent them back and said, "I want more information." If the thing persisted and the evidence still looked reasonably good, then, occasionally, I would call the competitor and say, "I have this situation. Is it true?"

Now, I say that in most of the calls that I made, people would say, "I don't know. I have to check." They would check and call back and either say yes or no.

Q. Had you had occasion to verify while you were at Masonite, Mr. Watt?

Mr. FRICANO. Objection, Your Honor.

Mr. BARTLIT. It goes to the witness' state of mind, Your Honor.

Mr. FRICANO. What Mr. Watt did at Masonite, or what he didn't do, isn't relevant to the charge of price fixing in this case.

Mr. BARTLIT. I would be delighted, Your Honor, to argue that, Your Honor, outside the presence of the jury, and we can do it at the close of court today, or we can——

[12,686] The COURT. No. We don't want to do that.

I will sustain the objection.

By Mr. BARTLIT:

Q. Now, you have told us that, in the fall of 1967, you were no longer personally engaged in verification, Mr. Watt.

Did your staff people continue to verify after that point in time?

A. Yes, they did.

Q. And did there come a time, to your knowledge, when your staff people stopped verifying?

A. Yes.

Q. And would you tell the jury the circumstances surrounding that event?

A. Well, there were two situations. The first was in the fall or summer, about June or July, somewhere in there, of 1968. And I tie in with the period shortly after Mr. Baldwin and Mr. Wright had become involved in marketing policy, and they had made some trips out to the divisions. In fact, I think some of the trips they had made along with a member of our legal counsel.

G–P's warehouses were beginning, more of them, to stock gypsum board, and, of course, they were becoming pricing centers, and, after they had made this swing around [12,687]

tended to reinforce the credibility of that in your mind; is that right?

A. That is correct.

Q. Did the fact that Georgia-Pacific was selling through all these warehouses, or these branches, I guess the evidence has shown that they were, the fact that G–P was selling through all these branches around the country, did that have any effect on your decision to have your staff——

[12,689] A. As I said, they created a lot of pricing centers. And, of course, if you multiply that by the fact that not only were we finding that they were making announcements, but so was everyone else.

Q. Did your two fellows, Wright and Baldwin, clear their recommendation with your lawyers?

A. Yes, they did.

[12,690] By Mr. BARTLIT:

Q. Now, Mr. Watt, after you approved the recommendations which you talked about to Mr. Wright and Mr. Baldwin, did there still from time to time come across your desk P/A's, requests for price adjustment, in which you and the people working for you couldn't be sure if the lower competitive price reported had, in fact, been offered?

A. Yes. I know that not all of them came across my desk, but there were some there was a question on.

Q. Let's assume after your memo they made a recommendation to stop verifying and you explained you went along with that, what would be done with the request for price adjustment after that period of time, where you or your staff weren't sure if the lower price was actually there or not?

What would you do?

A. In all of those cases I know about—and I know a number of them went to legal counsel without my knowledge—most of the time we had to have a proposal and a pretty good description of the circumstances of the offer.

And then we would refer it to legal counsel and say, "Now, do we have enough here to defend ourselves against any claim of discrimination?

Sometimes they said they didn't think we did and back they would go. Sometimes they did and they approved [12,691] them and we would meet the price.

the divisions and then visited a number of markets, they came to me and said that they felt it was kind of useless in verifying, because we had, at this point, so many different pricing centers.

And, by the time we got the data together to find out where to verify, why, we either lost the order, or the invoice had gone out incorrectly.

And they said, "We would like to stop. So forget it on gypsum board."

My reaction on that was sympathetic to their problem because I knew what they were facing, but I asked them if they had considered the fact that one of the main reasons for verifying is to make sure that you don't violate the Robinson-Patman Act under the good faith defense.

Q. The Robinson-Patman Act was still around after——

A. It was still there.

Q. Right.

A. And they said that was one of the reasons that they had one of the legal counsel travel with them, to get a first-hand look at what the market was like. And it was moving so fast that I think the decision finally was made, at least it was one that I accepted, the charges of discrimination under such a fast moving situation were minimal, if any at all.

So, knowing that they were covered up with work and [12,688] other things that we wanted them to do, I said, "Well, go ahead. It is all right with me. Stop on gypsum board."

Q. At or about this point in time, Mr. Watt, was there any difference in the amount, the quantum, of marketplace information about competitive pricing that was available?

A. Oh, yes, a lot more. There were some things I had never seen before, fliers that would go all over a particular marketing area. You didn't have any trouble deciding what the price was in a marketing area, because everyone got the flier or the offer. This was G–P.

There were telephone sales. We would have a salesman stuck right in the middle of his territory, and he would find that a telephone sale started at a G–P center, catching him at both ends.

There was plenty of market information on competition.

Q. Instead of having just a single, isolated customer report of a particular price, you would have a number of reports which

Q. You actually referred the physical papers, the file that came from the field, to your lawyers?

A. That is correct.

Q. Now, Mr. Watt, if you would look at Government Exhibit 23——

Mr. BARTLIT. Mr. Grainer, perhaps you could hand that to Mr. Watt.

By Mr. BARTLIT:

Q. Now that is a—Government Exhibit 23 is a letter signed by you.

It is dated February 23, 1969—which is already in evidence—and this is the letter which—the distribution is shown on the bottom—this is the letter which states that U.S. Gypsum had decided it would be prudent until the situation is clarified to avoid asking any competitors about his price, terms and conditions of sale in any particular market.

And it refers to the Supreme Court decision we have heard about, the Container Case.

Now, Mr. Watt, this is February, 1969, and you have told us that you stopped, personally, verifying in the fall of 1967 for the reasons you have given, and that your staff stopped verifying in the summer of 1968 for the reasons you have given.

[12,692] Why then did you sent out this letter in February, 1969, to a number of people telling them it is prudent to not verify until the situation is clarified.

A. The staff ceased vertification on gypsum board products in 1968. I had staff that continued to verify on other products and we have divisions whose pricing and policy people continued to verify on other products—

Q. What——

A. ——until this particular time.

Q. Excuse me.

What were some of the other products that various of these people were authorized to verify on up until February, 1969?

A. Well, I can tell that pretty well by the names. Insulation board, insulating wool. In fact, all non-gypsum products.

Now we come down here a little bit. Here is industrial—industrial plaster products.

Here is one that is a company that is a subsidiary of metal products, metal grating. Here, that would be mica.

Here is one on fibre resin. That is plastic overlay products that we make up in three plants.

Here is one that is the head of the mineral wool division.

[12,693] Here is one that heads up railroad sales. That is all products sold to railroads.

Here is the head of the paint department.

This covers, I think, all the active divisions we had at that time except A. P. Green and A. P. Green had the situation covered for them at their board meeting by their counsel.

Q. All the people listed on the bottom of Government Exhibit 23 were not people that worked directly for you or your staff?

A. No, sir, they were not.

Q. Were they people that worked in other divisions of the company for other line and staff people?

A. Yes.

Q. Can you tell the Court and jury, Mr. Watt, the circumstances which prompted you to send Government Exhibit 23 out in February, 1969?

A. Yes. I had a call from, I think it was Charles Price—yes, it was—telling me—and we had been hearing about this Container Case—that the Supreme Court had decided it, and that he felt that we ought to consider ceasing verification on all products.

I think the way it played, I said, "Well, you know, how do I say it?"

Q. Whose decision was it to send out this letter, [12,694] yours or his?

A. Well, he recommended it. Of course, I made the decision to send it out.

Q. Do you know who drafted Exhibit 23?

A. I think we both took a run at it. He drafted the first one. I felt it was too long and we worked it out.

But the language is his. I remember many of these words specifically.

Q. And why, Mr. Watt, did you decide to follow your lawyer's advice and send Exhibit 23 out to the people who are listed?

A. Because that is what I have been doing during all my career and that is the only way I know that I can be—it is the only place I can go to get advice. I am not a lawyer.

Q. Mr. Watt, do you know of anyone of your own personal knowledge at United States Gypsum who verified on gypsum wallboard products after the middle of 1968, when you had these conversations with Baldwin and Wright?

A. No, sir, I do not

Q. Do you have any personal knowledge of anyone at U.S. Gypsum verifying on any product whatsoever, any product whatsoever, after your February 13, 1969 letter, which is GX 23?

A. No, sir, I do not.

[12,695] Q. Now, Mr. Watt, there is in evidence a number of letters—Government Exhibit 601 is an example—and you saw one earlier today, a letter you wrote to Mr. Pecaro, which I think was 604 or 605.

These are letters regarding the establishment by U.S. Gypsum of a register with the Arthur Anderson Accounting firm listing jobs on which the U. S. G. had extended price protection. I am sure you recall those letters.

A. Yes.

Q. And those letters generally informed competitors that they can contact Arthur Anderson and find out jobs on which a customer had previously agreed to buy wallboard from U. S. G., and on which U. S. G. had previously agreed to sell at a particular price for the duration of the job.

Do you recall that?

A. Yes, I do.

[12,696] Q. Now, we have heard about job price protection and a lot of other things, and I don't want to again belabor the subject, Mr. Watt, but I would like you to briefly explain again to the jury just what job price protection is and what kind of problems that it raises—and Mr. Duffy talked about this today, so I don't think we have to elaborate, more than to bring the thing down into focus for your testimony.

A. Well, job protection is a peculiarity, I guess, to the construction industry. It comes about by the fact that, many times, contractors, subcontractors, in most cases, have to make bids far in advance of when the job will actually use the material.

Now, they make bids that are installed bids. Usually, it is a total bid.

Q. In other words, it is so many hundreds of thousands of dollars for the job, complete?

A. To install the material, labor, and the whole bit.

Now, on the labor side, of course, most of the construction industry, and the subcontracting industry, particularly, works on a three-year contract, and those contracts are largely public knowledge, so, many times, they can get some acceleration on a bid for labor, if it is known that the contract is up for renewal.

Q. You mean, Mr. Watt, that it has become sort of [12,697] the custom in the construction business that, if, in the middle of the job, there is a new labor contract negotiation, and the rates go up, the contractor can add that higher price into his rate, and the price can be altered?

A. He will certainly try and negotiate it, as a possibility; but, because those things are more public, it is easier for him to get people to go along with him. It is difficult for him to get a general contractor or an owner to accept an acceleration factor on materials. Each says, "That is your problem. You buy the material." So that that is the problem.

Now, the situation that we had here was one that, where we had made commitments, in turn, for agreement that they were going to buy the material from us.

Where it runs into difficulty is, as Mr. Duffy suggested, that, if a contractor attempts, by misrepresenting the facts, to protect himself for—let's say he used a million feet. I guess you could use any figure, 400,000 feet, for a job; and he, by going to two or three competitors, managed to wind up with three or four times that much protection. Then, he is actually misrepresenting the tact of what he—what we had committeed for, and, of course, that is—it is unfair to the other customers.

Q. Were there occasions when, Mr. Watt—when, as you have testified, a particular customer might get what you call [12,698] double protection on the same job from different competitors?

A. Yes, sir.

Q. And then he would have available—he could use one set of the protected wallboard on the job and then he would have that extra set of protected wallboard to use wherever he wanted.

A. That is correct. He would be competing with other contractors with an unfair advantage.

Q. Now, do you recall, Mr. Watt, that—let's go back, again, in your testimony, to the fall of 1965; and you heard Mr. Duffy talk about the price strategy that was adopted in the fall of 1965, and he testified that, from time to time, there were meetings when this price strategy—excuse me—was discussed at USG.

Do you recall that?

A. Yes, I do.

Q. Do you recall whether, in any of those meetings to discuss that price strategy, if the subject of job price protection came up?

A. Yes, it did.

Q. Do you recall being present at any meetings when the subject came up?

A. Yes, I do.

Q. And do you have any recollection as to who else was present?

[12,699] A. Yes. I think that that came up at some of the later meetings, when all of us were there. I think—well, I am not sure about Mr. Shaver; Mr. Morgan, Mr. Price, Mr. Duffy, I believe Mr. Gimlin, and myself.

Q. Can you recall the discussion of job price protection and the resolution of that situation?

A. Yes.

Q. Would you tell the Court and jury how that came to pass?

A. Well, the problem, I, of course, have already outlined. Here we were, with these commitments we felt that we had to stay with. We were concerned about the fact that there had been many examples of double protection.

We actually posed the problem to Mr. Price, counsel, and said, "Is there any lawful way, legal way, we can inform our competitors that we have made these commitments on these jobs?"

Q. You asked him whether there was a lawful way to inform competitors that you had previously made commitments which you were stuck with, so to speak?

A. That's right.

Q. And what happened next?

A. Well, I don't know that I got an immediate answer. He took it under advisement and came back on the basis that, well, there wasn't anything that he could see that was [12,700] unlawful about it, so long as they were for commitments already made, and, as Mr. Duffy had commented, so long as we did it out in the open, we were not trying to hide anything.

Q. Did Mr. Price make any recommendation to you as to how to mechanically accomplish this?

The COURT. Now, we will get the answer to that and then recess until tomorrow morning.

Mr. BARTLIT. Yes, sir.

The WITNESS. Yes. He did. We felt we should put the list with an accounting firm or some independent body, where people could make use of it—or not make use of it, but it would be there, on deposit.

* * * * *

[12,709] Q. Now, Mr. Watt, when we recessed yesterday, I had asked you whether Mr. Price made any recommendation as to how to mechanically accomplish the job price protection point, and you had testified that he felt the list should be put with an accounting firm, and that is where we will pick up today.

Now, Mr. Watt, did you have any agreement with any competitor to set up either your job price protection register or any similar job price protection register?

A. No, I did not.

Q. Did you have any ageement with any competitor to give or not give job protection in the future?

A. No, I did not.

[12 710] Q. Now, Mr. Watt, we discussed the period of time in the fall of 1965 when you were considering the new pricing strategies and the job price protection register. During this period of time, what was your principal activity in the company?

A. Well, most of my time was being spent working on our—the reorganization of our company, with consultants and with others.

Q. Would you——

A. Committees and so on.

Q. Excuse me. Would you briefly explain the broad nature of the reorganization and what you had to with it, how you were involved?

A. Well, the—of course, the objective was to reorganize—was so that more individuals would have accountability for net profit.

We had been organized functionally, where the only accountability for net earnings was with the chairman of the board. We worked with consultants in trying to come up with a structure that would do this, and we divisionalized—in other words, set up profit centers by product groups; and out of this came the four construction products divisions in the U.S.A., which, of course, dealt with gypsum board and gypsum products, generally. The process was one of, once we had worked out what we wanted as a structure, we, [12,711] of course, had to make a number of management changes. There was some—close to 300 position changes that were involved in this restructuring, and, once we had the board's approval, we had to put that into effect between—I have forgotten the exact date of the board meeting, again—early November and the end of December.

So the job of handling most of this, in terms of sitting down with people, explaining to them in groups and individually what we were trying to do, and why their jobs would be changed—the majority of that was delegated to—well, three of us did most of it: Mr. Rembert, Mr. Morgan, and myself.

Q. I would like to move on to another subject, Mr. Watt. We have discussed, in your testimony, price verification and your personal participation in that. Did you, from time to time, over the years, have other direct contacts with competitors, apart from the price verification that we have discussed?

A. Yes, I did.

Q. And would you tell the Court and jury for what reasons you had these other kinds of contacts? What categories did they fall into, and what were the purposes of contacts?

A. Well, they were, just to generalize, I guess, in three areas. One was that, all during the period, I had, as [12,712] the senior officer of marketing, responsibility for sales agreements with competitors, where we sold them products. I had other people working with me on it, but it was my responsibility.

The second one was the total construction industry, itself, as I think I indicated yesterday, is fragmented. It has a lot of organizations—the National Association of Home Builders, the National Retail Lumber Dealers Association, the Drywall

Contractors Association—not all of these have to do with gypsum, but they are involved in the construction industry, and then, of course, the Gypsum Association, itself, as well as some associations on other products.

Q. Well, let's take your second category first. You said that you were involved in things that involved the entire construction industry, not just gypsum, but other kinds of construction products.

A. That's correct.

Q. Can you give some illustrations of occasions like that, where you might have had contacts with competitors?

A. Well, the National Association of Home Builders, which, I think, is probably the largest—yes, it is the largest organization in the construction industry.

Q. Who would belong to an association like that?

A. Home builders.

Q. You mean contractors?

[12,713] A. Contractors, but people who—contractors who specialize in building homes and apartments, garden apartments, residential buildings.

They, many years ago, had set up what they call a Housing Center Council, which was made up—it changed, over the years. Currently, it is, I believe, 9 builder members and 9 manufacturer members, and I had, at various periods of time, in the period we are talking about, been the company's representative, and then, in later years, I was made a trustee of this Housing Center Council and spent one year as vice chairman of it.

That is one type of thing. Of course, there were others. Some of——

Q. And I take it, Mr. Watt, that there were representatives of all portions of the home building industry that would be on the board of directors, or whatever organization governed this group; is that right?

A. Yes. The Board of Trustees itself, as I indicated, was made up of, I believe, 9 builders and 9 representatives of manufacturers, and then, beyond, that, there was a total council, so there were a lot of different building material, construction material manufacturers involved.

A. And, from time to time, at gatherings and associations like this, you would meet with competitors; is that right?

[12,714] A. That is correct.

Q. Now, in this first category, Mr.Watt, on any of the occasions when you ran into your competitors at general construction industry gatherings, did you ever enter into any kind of an agreement as to what the prices would be for gypsum wallboard for any wallboard competitor?

A. No, I didn't.

Q. Now, let's move to the second category of competitive contacts.

I think you said that you were involved in contacts whereby U.S. Gypsum was selling different things to your competitors, and you might be the individual who was involved in that deal, and you talked to the competitor when you were selling him things; is that right.

A. That is correct.

[12,715] By Mr. BARTLIT:

Q. Can you give us some examples of that kind of a buy-sell relationship?

A. Yes. A number of, really.

One might be—Well, product lines, or the products that we sold were varied. But, thinking back, some of the largest volume items we sold, insulating wool was one.

Q. Who did you sell that to?

A. Well, Celotex was our primary private label account.

Q. Is insulating wool the same product as mineral wool?

A. Well, it has a lot of different names. There are different ways of making it. Our product happened to be what we called mineral wool.

The basic ingredients are slag, limestone, and so on, which is melt and then expanded by steam.

Q. So that there are different kinds of insulation wool, and one kind is mineral wool; is that correct?

A. That's correct. It is a general type.

• • • • •

[12,721] Q. * * * You told us that Celotex was buying your mineral wool and they asked you to try to come up with glass wool. You actually told us you engaged in research to produce glass wool; is that right?

A. Yes. We undertook a rather lengthy and very expensive research program. And, well, I might say that we were successful in making a product. It was possible to convert a cupola to do it, but the cost of doing it was such that there was not only no profit in it for us—as it [12,722] ultimately worked out—but therefore there wouldn't be any use going into the business.

Q. Mr. Watt, from time to time did Celotex threaten to cancel your mineral wool contract because you weren't able to replace it with glass wool?

A. Well, initially, of course, we tried to convince them that we were going to be successful in this research project.

And, although they had expressed dissatisfaction and concern that they were losing business because they didn't have fiberglass, I think they had some confidence that we might be able to do it, so they didn't threaten to cancel initially. But, as time went on—and I think our research program spanned two years or better—they then, of course, began to get pretty impatient, and we weren't coming up with it, and they did threaten to cancel.

[12,723] By Mr. BARTLIT:

Q. And what, roughly, was the period of time covered by the problem you were having with Celotex?

A. Well, the concern about fiberglass, of our having it, I recall that this began to be talked about in, oh, '62–'63. I am not too sure when our research program started, but I think it was right about that time.

Q. Did you have discussions, Mr. Watt, you personally, with representatives of Celotex in an effort to convince them to continue buying the mineral wool and give you more time to develop your glass wool?

A. Yes, sir, I did.

Q. And why were you personally involved in these discussions, Mr. Watt; can you tell us the importance of a contract of this type, mineral wool contract, to U. S. Gypsum?

A. Well, there were two reasons why it was important. One, it was good business. I think in the period from—well, up until they canceled, which would have taken it up through—I think the cancellation became effective in 1967, early 1967. I have to make a pass at this. That would be six years. I would say that it averaged a couple million dollars a year. So we are talking

somewhere in the neighborhood of eleven or twelve million dollars total sales on which we were making a reasonable profit. So it [12,724] was important.

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[12,726] Q. And I take it there were other ocasions on which you had business transactions of this type with competitors that we haven't gone into today?

A. Oh, quite a few, yes.

Q. Now, did you on any occasion, Mr. Watt, when you were personally involved in a business transaction of this type with a competitor on mineral wool or stucco or any of these other products, paper, did you ever use the occasion of that personal meeting to enter into an agreement with that competitor on the price of gypsum wallboard?

A. No, I did not.

Q. Or to the terms and conditions of sale for gypsum wallboard?

A. No.

Q. Now, finally, Mr. Watt, you said there was a third area where you had personal contacts with competitors, and you named the Gypsum Association; do you recall that?

A. Yes, I do.

• • • • •

[12,727] Q. Now, why was U. S. Gypsum, to your knowledge, a member of the Association, and why did you participate in the Association, Mr. Watt?

A. Well, the Gypsum Association, of course, was important to us because gypsum was one of our major products. I believe in associations. I think that, particularly, I think they are needed in an industry which is, again, as fragmented as the construction industry. There are things which have to be developed that you cannot do as an individual member. I would like to give some examples of that if I may.

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[12,728] Q. Mr. Watt, you were beginning to tell us a moment ago that there were certain things that you thought associations like the Gypsum Association could do in industries like the one you are involved in that one company or two

companies couldn't do by themselves. Can you give the jury an explanation of what you mean by that?

A. Yes. It falls into many areas, and I probably could deal with it in terms of why you have certain standing committees in an association. A very simple example would be this. Literature which is used to develop specifications or specifications which are part of a building code in a municipalty or state, which is one manufacturer's literature, generally is not acceptable.

[12,729] By Mr. BARTLIT:

Q. Why is that?

A. Well, they don't want to be in a position that they are advertising one manufacturer, and they just wouldn't buy that way. So they are writing specifications, and they want—in most cases, they want an industry specification or industry literature.

So that, in the case of the Gypsum Association, we did produce a lot of literature that was industry literature. It didn't talk about brand names. It just talked about the product and the system and its performance.

Another example of literature is any industry or manufacturer gets a great number of requests from colleges, high schools, and trade schools, where they are teaching construction trades, and, there again, they don't want to talk about one manufacturer. They want something that represents the industry.

The other side of it, when you get over to the technical side, if you develop a system that is a wall system that has a one-hour fire rating, and as I think Mr. Day explained some of this, a certain sound rating, again, building codes, they want that to be a building industry specification. They are in the same position. So that the Technical Committee is faced with the responsibility of coming up with performance tests which the building code people can [12,730] then say, "Okay, here is an industry specification for this type of performing wall or ceiling."

There are more, but safety was a big one with us, because, here again, the number one operating rule in our company has always been safety first, and the Gypsum Association did and has over the years conducted a very expensive safety training program, and we have had a series of awards for the plants that have the best performance, and so on.

Q. Tell me this, Mr. Watt. Over the years, beginning when you came back to the company in 1962, what were the Association activities in which you involved yourself the most, and why.

A. Well, my involvement with the Association was as a member of the Promotional Committee, dealing with literature and advertising and that kind of thing.

As I became a director of it, of course, my interests were broadened, and I spent a good bit of my effort on this, the Technical Committee and the Building Code Committee side, as far as activities, directing activities. And I didn't lose track of the promotional thing. I kept kind of close to that.

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[12,732] Q. Now, Mr. Watt, there is evidence in the record, and you have testified, over the years you had direct contact with competitors at various kinds of Gypsum Association functions. There have been minutes of meetings that show attendance by you and others, and you have seen that evidence as you sat in the court; isn't that right?

A. That is correct.

Q. On any of those occasions of Gypsum Association meetings, did you ever discuss with one of your competitors the prices and terms and conditions of sale, or the way the product ought to be handled and sold? And I am talking about gypsum wallboard.

A. No, I did not.

Q. On any of those occasions, Mr. Watt, did you ever agree with any of our competitors on the prices, terms and conditions on which your gypsum wallboard was to be sold?

A. No, I did not.

Q. Mr. Watt, again with regard to the association, did you ever have occasion to meet with staff members of the association or other officers of the association with regard to internal administrative matters affecting the association itself?

A. Yes, I did.

Q. And can you tell us some examples of those kinds of contacts?

[12,733] A. Well, I took my participation in all associations that I was active in seriously, and associations are like everything else, they are subject to Parkinson's law, and, occasionally, they grow beyond what they need to be in terms of cost.

I mean, it is not unusual for people to come up with ideas, and some of them may be good ideas, but if you don't watch it, it expands.

I was a director, whether I was president or not, through that period. I was a director, and I was a director that was in Chicago, where the headquarters of the association was, so I was frequently called upon or appointed to participate in some things that had to be done administratively.

Q. For example?

A. An example might be that, when you change executive directors, there might be three or four of us that might get involved in it, because you have to have an acceptable candidate.

Another one I particularly recall was that—the revision of a retirement plan.

Q. For who?

A. For the staff people in the association. I wasn't a retirement plan expert, but I had access to people in our company and outside, and so I was put on a task force to take a look at that, with some other people, and we did come up [12,734] with a new plan.

Q. In considering a new retirement plan, you would have occasion to be in the same room with one of your competitors who was also working on a committee; is that right?

A. We would have meetings to get it ironed out?

Q. On any occasion when you had contact with your competitors and staff members of the association to discuss internal association matters, did you ever engage or make any agreement with any competitor on the prices at which wallboard was to be sold or the terms and conditions of such things?

A. No, I did not.

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[12,734] Q. Now, Mr. Watt, have you read the charges against you in this case?

A. Yes, sir, I have.

Q. Have you ever during your life, Mr. Watt, combined or conspired with anybody in the gypsum industry or any industry to set or fix or maintain or stabilize or set the terms and conditions of the price of wallboard or any other product?

A. No, sir, I have not.

Q. Are the charges against you true or false, Mr. Watt?
A. They are false.

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[12,755] CROSS-EXAMINATION

By Mr. FRICANO:

Q. You have described, Mr. Watt, various strategies which United States Gypsum has employed since 1962 in attempting to raise the profits of the company and sell more wallboard, have you not?

A. Yes, I have.

Q. Now, one of the strategies was the defensive pricing strategy, I believe you called it, which existed in the earlier period from approximately 1962 to the time that you increased prices in December 15, 1965; is that correct?

A. No, I think I characterized the defensive period as the period 1962 until some time mid-1965. I characterized it that way.

Q. So I am off by a couple of months?

A. Yes.

Q. Well, did you consider the situation which existed in 1962 through 1964 against the Texas Gypsum Company, and the attack upon its establishment, defensive, sir?

Mr. BARTLIT. Objection to the characterization, Your Honor.

[12,756] The COURT. Reword your question.

By Mr. FRICANO:

Q. In 1962—and for some time prior thereto to approximately 1960 that you weren't with the company—but at least in 1962 you were aware, were you not, that Mr. Huckleberry of the Texas Gypsum Company was trying to get his company off the ground and become a successful operation, weren't you?

A. I have heard more about Texas Gypsum and Mr. Huckleberry in this courtroom than I heard during the time he was trying to get his plant off the ground. I wasn't that familiar with it.

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[12,760] Q. Would you describe in this time period, in about 1964, early 1965, the dropping of the price in Republic Gypsum Company's marketing area as soon as it came on-stream as defensive pricing?

A. Yes, sir, I did. We were meeting competition [12,761] That is defensive.

Q. Oh, when you meet competition, you don't attack; you draw back, is that right?

Mr. BARTLIT. Objection to the characteriation.

The COURT. Oh, yes. Come on.

Mr. BARTLIT. Argumentative, in addition.

The COURT. I have sustained the objection.

By Mr. FRICANO:

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[12,763] Q. Well, if you dropped the price, you wanted discounts to be eliminated; didn't you, sir?

A. I dropped the price because I couldn't keep up with the discounting, and we republished and said, "This is what we are going to sell at. If it goes more than 5 percent under, we will drop it again."

I wanted to get our business back.

Q. I will ask it again: was it your belief, by dropping the price, you would stabilize the market?

Mr. WARNKE. Objection, Your Honor; irrelevant.

The COURT. What is the relevancy of that?

Mr. FRICANO. If Your Honor please, I believe there is a document in evidence that shows one of the considerations in dropping the price was for the purpose of stabilizing the marketplace.

Mr. BARTLIT. Your Honor, it is still irrelevant.

The COURT. Suppose there is—what is the relevance of stabilizing the price?

Mr. FRICANO. During this time period, from the witness' own testimony, he was in contact with his competitors concerning these prices.

[12,764] The COURT. Well, if there was an agreement to stabilize prices, that is one thing, but merely a unilateral attempt to stabilize price is not illegal.

Mr. FRICANO. No, not unless the company has such control that it can drive the market down and put others out of business.

Mr. BARTLIT. There is no charge of that in this indictment.

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[12,766] • • • Q. Well, did you know Malcolm Meyer?
[12,767] A. Yes, I knew Malcolm Meyer.

Q. And he was the president of the Gypsum Association at about the time you joined it, in '62; wasn't he?

A. I can't recall that, but it could be. If you have a list of them, will accept that. I don't recall who was president when I joined.

Q. Well, did you ever discuss with Malcolm Meyer his visits to Mr. Hucklebery in an attempt to get Mr. Hucklebery to stop trucking and join the Gypsum Association?

A. No, sir. I do not recall any such discussion with Mr. Meyer or anyone else.

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[12,780] • • •

The COURT. I don't understand what you are talking about. An application for a loan to the Economic Development Administration for a new gypsum plant. I don't know what the Economic Development Administration is, for why somebody wanted to loan them money.

The WITNESS. I don't have a real clear recollection, but I think I can help a little. I don't know whether this ever went ahead or not, but there was an application to the Economic Development Administration—I keep remembering it as the initials EDA—and I don't know who that application was made by. But there was some concern expressed that the fact that somebody could get [12,781] a complete loan to go in the business through a government agency which was supported by the taxes that all of us were paying wasn't a particularly popular idea. I think that we were trying to get some data together that would enable us to write our congressmen or do whatever we could do to say that we would like to prevent that. That is my best recollection of it.

The COURT. Ladies and gentlemen of the jury, you cannot reach a conclusion that the opposition to such a loan was a violation of the antitrust laws. You cannot reach such a conclusion because there is nothing that appears here to indicate that it was.

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[12,790] Q. Where is your greater amount of profit at United States Gypsum, Mr. Watt? Is it on half-inch board or the more expensive board, fire-rated board, water-resistant board and so forth?

A. Dollars of profit, I would say that the more expensive board, you have more profit, yes.

Q. Is it also fair to state with respect to various types of the more expensive board, for example water-resistant board, you don't have any competition from the single plant producers?

A. No, I don't think that is a fair statement. I think some of them have—in fact, I think all of them have water-resistant.

Q. Water-resistant?

A. Yes. They may buy it from somebody.

Q. Did the single plant producers from 1963 to 1973 market as much expensive board as United States Gypsum?

A. No. Not all multi-plant producers do, either. There is a wide variation in who markets what.

Q. With respect to the variation, is it fair to state with respect to the single plant producers they market, in comparison to the multi-plant producers, they sell and market fewer types of expensive board than the others?

A. Let me think now. If we think of all of them—maybe I could help by running down. I think that the largest [12,791] broadest product line, which is what I think you are referring to, would be ours and probably National very close to that. I don't think Georgia-Pacific has all of the depth of product line that we do.

Single plant—now, you are now—I have thought it through a little bit. Your question is is it fair to say what? I have lost that part of it.

Q. Is it fair to state that given multi-plant producers production of expensive board, vinyl covered board, water-resistant board, what have you, that by comparison the single plant producers do not market as much either in quantity or in type?

A. I think that is a fair statement.

Q. So would it equally be fair to state with respect to that type of board which they do not market, the multiplant producers do not have any competition from the single plant producers.

A. I couldn't categorically say that, because there are job situations that I have known of where the single plant producer was able to purchase the expensive board from someone else and be part of the battle to get that job, so I can't categorically say that.

Q. Say in the majority of instances, then, sir.

A. In the majority of instances, they would not have as broad a product line, that is correct.

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[12,794] • • •

Q. How about after December 15, 1965, when the stated [12,795] policy of your company was at least internally not to meet any price cuts by competitors, and to sell only at list?

A. Well, at that point I would say that the percentage would be very high.

Q. Very high?

A. At least in the early months.

Q. 1966?

A. That is the only way we were selling.

Q. How about——

A. Initially——

Q. Excuse me. I don't wish to interrupt you, but sometimes you fake me out.

How about in 1967?

A. In 19—By 1967, even in 1966, we had begun to meet some situations. In 1967 there would have been more, so we would be going back again now to a smaller percentage being sold at published list.

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[12,809] 306 is a USG price analysis of USG's realized price and market share for the period from 1966 through 1973.

And USG 1200 is a similar analysis from the earlier period from 1961 through 1965.

Do you have those both in front of you now, sir?

The WITNESS. 306 and 1200, yes, sir, I do.

By Mr. FRICANO:

Q. All right, sir.

Now——

I don't think we have the big blowups here.

Exhibit 1200 shows that in 1962 there was a price, a realized price, excuse me, of $42, does it not?

A. $42.21; that is correct. You said '62?

Q. That is right, sir.

A. Yes, $42.21.

[12,810] Q. And in 1961, it was 42.55?

A. That is correct.

Q. Now, if you were to go to 1965, it shows a price that would be—excuse me. Still on Exhibit 1200—of 36.79?

A. That is correct.

Q. And continuing on it shows a price in '66, an average realized price for average one-half inch wallboard.

A. Now we are over to 306, correct?

Q. Yes, sir.

Of $39, and in 1967 it goes up to $40.77?

A. Correct.

Q. And in 1968 it goes down to $40.03?

A. Right.

Q. In '69 it is 36.02?

A. Correct.

Q. In 1970 it is 31.29?

A. Yes.

Q. So from 1968 to 1970, there is a drop, is there not?

A. Yes, considerable drop.

Q. Now, were you making a profit when you were selling wallboard in 1970 at $31.92 for an average realized price on half-inch wallboard?

A. Well, 31.29—were we making money?

[12,811] Q. Yes.

A. Yes, we were making a profit. We made some profit in 1970 on gypsum board products.

Q. Now, in 1969, and that has been described here as a battle year, wasn't it?

A. It was our worst year in terms of earnings on gypsum, and it was a battle year; that is right.

Q. Now, going backwards from 1970. 1969 has an average realized price of $36.02, does it not? That is a higher realized price than in 1970?

A. Yes, 36.02 is higher than 31.29. That is correct.

Q. Were you making money at $36.02?

A. Yes, we made a profit in 1969.

Q. Well, can you tell me, can you tell us, why or what difference there was between 1970 and 1969 because in 1969 you were making—you were selling wallboard at a higher average realized price; what accounted for that?

A. Well, in 1969—it is lower than '68. We were pretty much back on the defensive game of chasing PA's, and that sort of thing.

In 1970, Georgia-Pacific—it has been described here as a war zone, and Georgia-Pacific's centers were operating in full swing. And we were dropping prices and creating zones around those centers to meet their competition. [12,812] And so the war that you spoke of accounts for the drop in realized price from 1969 to 1970. We were more aggressive in 1970.

Q. That is right. And as you testified, by that time the Georgia-Pacific distribution centers had fully assimilated a line of wallboard; is that right?

A. Well, actually, I guess there were quite a few of them which had assimilated a line of wallboard prior to that, but they seemed to be particularly anxious to dispose of it at almost any price in 1970.

Q. All right, sir. Would it be fair to state then that the higher realized average price in 1969 was attributable to less competition?

A. No. I would say it was attributable to the fact that we didn't wake up as to how badly we were being taken in 1969. We woke up in '70, and we went over it.

Q. Your market share didn't change. In fact, your market share in 1970 was 31.4 percent, and in 1969 it was higher, it was 33 percent?

A. That is correct. We got outmaneuvered.

Q. Your market share increased, and your average realized price increased and you got outmaneuvered?

A. No, you said—are we talking 1970?

Q. I am talking about 1969 as compared to 1970.

A. All right. In 1969 the price dropped from 1968, [12,813] almost $4, $4.01 to be exact. The industry position went up .2 of one point. That is '69 as compared to '68.

Q. Yes, sir.

And in '68 the price was even higher, the average realized price was $40.03, or an increase of some $4.01; is it not?

A. Well, 1968 was $40.03. That is what I just said.

Q. Why is it in 1968 your average realized price was $40.03 as contrasted to $36.02 in 1969?

A. There was more competition in 1969.

Q. And less than '68?

A. Or less that we met.

Q. Yes, sir.

And your market share didn't suffer then either in 1968 to a substantial degree because your market share as compared to 1969 where it was 33 per cent it was 32.8 per cent in 1968, was it not?

A. Those two years I would say are a pretty good record of holding market share. Again, when you look at the market share in '68, we picked up .2 of a point in that year and dropped $4 in price. So you win a little, lose a little, but that didin't balance out too well.

Q. If you look at and compare 1968 with 1967, you will see your average realized price in 1967 was higher than your average realized price in 1968; can you [12,814] account for that?

A. Yes, we were meeting less competition in '67 than we were in '68.

Q. And your market share was about 32 per cent, was it not?

A. That is right, 31.9. It was low, and it was down from 1966 of 34.3. That is a pretty big drop.

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[12,818] * * *

The Court. Gentlemen, in order that I may properly consider any points for charge which you wish [12,819] make, I would like to have them by the close of the day on the 19th.

Mr. McSweeney. I couldn't hear you, sir.

The Court. The close of the day on Thursday, June 19.

We will not be here on the 20th. We will not be here on the 23rd. There will be no Court and that will give us an opportunity to consider those matters.

I would like to have, if you wish me to consider your points for charge. I would like to have them by the close of the day on the 19th. It was my understanding that you had planned to have them all in on the 20th, anyway. If you wish me to consider them, please have them in by the close of the day on the 19th.

Mr. FRICANO. May I ask a question in that connection, Your Honor?

I don't want to give this Court what I have heard some Court's refer to as larded charges, where facts, evidence are all mixed in together.

The COURT. I do not charge on facts, on the fact situation.

Mr. FRICANO. What this Court wants——

The COURT. I want to charge on the law. I want points for charge on the law.

[12,820] If you will give me the benefit of the doubt, I am aware of the presumption of innocence and the burden of proof, so I won't need that kind of a charge. But those points for charge which are unique to this case, I would like to have that so that I may have an adequate opportunity, and the week of the 23rd, which appears to me as now going to be our last week of testimony. Maybe I am wrong, but this will give me an adequate opportunity to study the points for charge.

If you preserve them and don't give them to me, I just won't have a chance to really thoroughly study them.

Mr. MELLOTT. If Your Honor please, we will try to meet that schedule, but I don't know whether we will have all of them ready by Thusrday. And we would urgently request you give us until Tuesday morning, if we have some additional ones that we want to submit at that time.

The COURT. We will have two days with no court and that gives us an excellent opportunity to study them. It is a very difficult proposition for me to be in court all day and study and consider points for charge.

Mr. MELLOTT. I understand that fully.

The COURT. So if you want me to consider them thoroughly, please get them in by that time.

Mr. MELLOTT. We do want you to study [12,821] them thoroughly, but we are also in court all day and most of us—those lawyers who are in court, want to spend time on them ourselves. It is not something I feel we can turn over to lawyers who are not in court. And therefore the week-end was a good time for the six groups of counsel for the defense to work on it. But we will do our best.

The COURT. The only alternative I have is going to be recess this trial for some time to do that, to consider that.

Now that is not a very good thing to do when you have got a jury.

Mr. MELLOTT. I understand that, Your Honor.

The COURT. So that is why I have asked you to do it this way. If you don't want to do it that way, don't do it that way.

Mr. MELLOTT. We are going to try.

The COURT. If you get them on Tuesday, I will give them only such consideration as I have time for.

We will be in recess until 2:00 o'clock.

Mr. DELONE. I would like this on the record.

Your Honor said something we had been planning to submit them on the 20th.

The COURT. I had been so advised.

Mr. DELONE. I had never heard of any such plans.

[12,822] The COURT. Then I will—

Mr. DELONE. The first knowledge I had of that is today. It is hard for me. I happen to have a set I am trying to work on right here today in the court. I am conscious of Your Honor's request, but I never knew I was expected——

The COURT. Let's assume you weren't. I would like to have them.

Mr. DELONE. I understand Your Honor's wish and we will do the best we can.

The COURT. That is all I can ask you to do.

Mr. DELONE. I also have witnesses that we are working with in the evening.

The COURT. And I am sure you are aware you gentlemen have far larger staffs to work on this than just the two of us. If you want me to give them consideration, get them in. If you don't, you will take my charge as I give it. If you want me to give consideration to your points, I suggest you get them in on time.

Mr. DELONE. May we have leave to supplement them?

The COURT. You can do that after you [12,823] hear my charge. You know that.

Mr. DELONE. I didn't mean to burden you with oral supplementation.

The COURT. As I understand the law, I have to get a charge ready and I have to tell all of you gentlemen how I am going to charge.

Mr. DeLone. I understand.

The Court. There is no way to physically do that and consider your points if you don't get them to me in time to consider them.

Mr. DeLone. I understand that, too.

The Court. I am trying to work this out so you get everything to which you are entitled. If you supplement them after I have got my charge ready, there is no way to do that.

Mr. DeLone. I didn't mean that, sir, but we would get as many as we could in by the 19th.

The Court. You do that, and if I have any time to read your later ones, I will do it.

• • • • •

[12,828] Q. Did you testify, sir, on direct examination, that the net earnings of United States Gypsum Company decreased between 1965 and 1966, when your strategy changed?

A. I testified with respect to gypsum board earnings.

Q. Yes, sir.

A. And I think Mr. Duffy testified about total earnings, but they both went down.

Q. Sir, in that time period, between 1965—or comparing, I should say, the years 1965 and 1966 with respect to net earnings, is it not a fact that the reason—the principal reason why your net earnings decreased was because the entire industry had fallen off from a production standpoint, due to demand—or the lack of demand?

A. Oh, demand was down in '66 versus '65, at least housing starts were, but that was not the total cause of the loss of earnings.

Q. Well, that certainly contributed to it; did it not?

[12,829] A. In terms of dollars and cents, yes, it would.

• • • • •

Q. Back in '38, when you first came with the company, Mr. Watt—excuse me. I am looking at a document. Forgive me. You said that you saw a bible, and I guess you called it the legal aspects of selling; is that right?

A. No. I referred to a bulletin book, which was issued to all salesmen and all sales correspondents, and I referred to it as the bible of our instructions.

Q. That is what I meant to say, sir, that is what I meant to say.

Would you take a look at Government Exhibit No. 22, please, if Mr. Grainer would hand the witness Government Exhibit No. 22, and, when you get that, I am going to ask you if you identify that as the bible.

A. No, sir.

Q. That is not it? Was it a——

A. I think I explained that the book—the bulletin book, which I referred to as the bible of the salesmen's selling equipment, had many sections in it on product, on price, and a general section which included a bulletin on the legal aspects of selling.

[12,830] By Mr. Fricano:

Q. And this document, Exhibit 22, which was taken from the files of United States Gypsum, used in evidence, is entitled "The Legal Aspects of Selling;" is it not?

A. That's correct.

Q. Now, I'd ask you to turn to a page which is numbered with a code. No, it is page Roman 12—Arabic 11. Would you turn to that, please, sir.

A. Yes, sir, I have it.

Q. Now, if you will glance at the last paragraph on that page you will see—will you not—that in this particular section of this document entitled The Legal Aspects of Selling, the instructions here deal with defenses to a violation of the Robinson-Patman Act; do they not?

A. May I read it?

Q. Certainly, sir, if you would, please.

In fact, I intend to read it aloud anyway, sir, so I will read it and you follow.

It is a defense to a violation of the Act——

The Robinson-Patman Act that is

> —that the seller makes a lower price or furnishes services or facilities in good faith to meet an equally low price of a competitor or services or facilities furnished by a competitor. This permits a seller to meet in whole or in part, [12,831] but not to beat, an actual competitor's equally low price without having to extend that price to all other competing customers. Thus, it is per-

missible for the company to meet competitive situations as to price, policy, service, terms and conditions of sale either wholly or in part. The facts justifying such a meeting of competitive situations necessarily can only be obtained in the field from the trade. Pertinent facts should be recorded on appropriate forms for future reference.

Now, did the Legal Aspects of Selling which you read back in 1938, Mr. Watt, did that include the sentence as follows:

> The facts justifying such a meeting of competitive situations necessarily can only be obtained in the field from the trade.

A. I am sure there have been changes in this document over the years, so I can't say that it included that sentence. I just can't remember that far back.

I remember the document Legal Aspects of Selling dealing with this kind of subject.

Q. All right, sir.

Well, let me ask . . .

A. This is a later edition.

Q. This is a 1960 version; is it not?

[12,832] A. Well, I don't know.

Q. Well it says "printed——"

A. Yes. It says "printed in September of '60."

Q. Well, sir, when you were a salesman, up until the time that you became an official of the company, was it your practice to contact competitors to find out whether or not you were truly in a competitive situation?

A. No. No.

Q. Did any of your fellow salesmen or associates contact competitors to ascertain whether or not they were truly in a competitive situation?

A. Not to my knowledge.

Q. After you became an official of United States Gypsum, did you then begin to contact competitors concerning whether or not you were in a truly competitive situation?

A. I think I testified yesterday that I did, yes.

Q. Does the fact that when you were not an official and you did not contact competitors, and the fact that when you became an official you contacted competitors, in violation of the

sentence which I have read to you from Roman 12—Arabic 11 from Legal Aspects of Selling?

A. Well, the fact that I was an official or not had nothing to do with it. This document, in whatever form over the years it has been published, was for field sales people who were not authorized to make verification calls at all. [12,833] So that this document has nothing to do with the authority I was given at the time I moved into a position where it was necessary or part of my responsibility to make verification.

Q. Well, it was the responsibility of sales people—was it not, sir—to make sure that when they signed their name to that green sheet saying, "This is truly a competitive situation," that they have reasonable evidence to base that upon? Isn't that true?

A. To the best of their ability they were to supply all the information they could get.

Q. And they couldn't—according to this policy—pick up the telephone, call their counterpart, the other salesman, to find out if they were truly meeting a competitive situation; could they?

A. No, sir, that was against the policy.

Q. That was against the policy?

A. That is correct.

Q. But when you were an official the policy was different; is that right? Then you could do it?

A. Well, I am a little misled by your constant reference to "official." When I was in a position in management where I was given that authority, I did it.

Q. All right, sir.

Is it fair to say then that there was a double [12,834] standard at United States Gypsum, one for salesmen and one for officials?

Mr. BARTLIT. Objection, Your Honor.

The COURT. Sustained.

By Mr. FRICANO.

Q. Where did you get the authority to do, pick up the telephone from time to time to both obtain—or not obtain, but to give information concerning prices and terms, and to obtain information from competitors concerning prices and terms?

A. From my immediate superior at the time. I had a position that I was required or it was necessary for me to do it.

Q. What did you construe this document to do for you, if anything?

A. As a restatement of the principles of how the company's people should conduct itself with relationship to its contact with competitors.

Q. You did not construe it then as authorization in writing to do that?

A. No, sir, I did not. I had the authority.

Q. With respect to those who had not had the authority at this time, would it have been authority for them to engage in the practice?

A. No, sir.

Q. It would not have?

A. No, sir.

Q. So that if they did do it they would be in violation of this document—is that correct—in the principles expressed therein?

[12,837] A. That would be my impression.

Q. Why did they receive the document?

A. Because it deals more with the whole idea of comporting yourself in the company of competitors. And, many of our people had occasion to be in company with competitors, whether it was social occasions or association things, or home builders, or dealer organizations. There were lots of places where you ran into competitors.

And, this document was intended to state the company's position, how do you handle yourself in those kinds of situations.

Q. And under those circumstances, when someone did bump into a competitor in a particular situation, would this language then apply as appears on page 3:

> Under such circumstances we are entitled to seek information any place we can get it, and it is proper to ask competitors what prices they have charged or are currently charging, or what terms and conditions of sale they have offered or are currently offering. The competitor may refuse to answer or may even given an evasive or incorrect answer, but we are entitled to ask the question and to seek whatever information the competitor is willing to give.
>
> We will also answer similar inquiries from a [12,838] competitor as to our prices and terms and conditions of sale in any market to the extent we feel it is prudent to do so. It is often advisable to answer such inquiries, be-

Q. And who was your immediate superior at this time?

A. At the time I was involved, Mr. Frank Sadler.

Q. Was this authority which you received reduced to writing?

A. No. I have testified though I was told about it.

Q. And what year was this?

A. Well, the first instructions, as I indicated, other than this part, which I had gotten through the period of time I was a salesman and sales manager, was in 1952.

Q. So, as early as 1952 you had the authority to exchange prices and terms with your competitors; is that correct?

[12,835] A. No, I did not have the authority in '52. I was Assistant to the Vice-President of Sales. I first had the authority when I moved into a merchandising position. I believe that was 1953.

Q. 1953?

A. That's correct.

Q. I see.

Did you subsequently, at any point in time, receive authority to engage in this practice in writing?

A. No. My authority had been continuous up until the time that I left the position in merchandising, or into advertising and promotion.

Mr. FRICANO. May the witness have United States Gypsum Exhibit 63, please.

The WITNESS. Are you through with this?

Mr. FRICANO. Yes, sir. But I wouldn't put it away. I'd just close it up.

By Mr. FRICANO:

Q. All right, sir.

You will see that this is a document which was signed by Henry C. Bear, Vice-President of United States Gypsum at this time, and it is dated February 13, 1962, and it is from Graham Morgan. And it contains—as I am sure you are aware by now—a statement regarding, memorandum [12,836] regarding relationships with competitors. You are familiar with this; are you not?

A. Yes, I am.

Q. Did Mr. Morgan ever provide you with one of these?

A. Yes. I received one.

Q. You did receive one?

A. Yes.

> cause otherwise the competitor may be misinformed as to our prices and policies, and answering the inquiry may avoid consequences unfavorable to the company.

Mr. KECK. Your Honor, I ask that he read the introductory sentences of that same paragraph.

Mr. FRICANO. "There are occasions when the company must try to determine the competitive situation in the market or with a customer. Such occasions usually arise when there is reason to believe that a competitor has a lower price or more favorable terms and conditions of sale, and it is difficult to determine the facts either because of the trade factors in the market, or the particular customer will not reveal the situation, or there is reason to believe that the trade factors or customers are not being frank in what they tell us."

And then the rest of it is what I read.

By Mr. FRICANO:

Q. And my question preceded my reading of that paragraph, I believe, Mr. Watt. And that is: In this sense, when you or someone who had received this document was in a [12,839] situation where a competitor asked for information concerning prices or terms, if that person knew, could he answer the question?

A. No, sir, not by this document. He would have to be given authority specifically. This document is information, it was telling everyone how we conduct ourselves, it was not an authority. I might refer to the last sentence:

> It is important to avoid any conversations with competitors about our or their future prices and selling policies, because such conversations, even though there is no attempt or thought of reaching any agreement or understanding, are often looked upon with suspicion, and our policy is to avoid the subject entirely.

This was not an authority to make verification, it was information.

Q. Well then, is it fair to say, sir—given your answer—that the authority to engage in the exchange of prices and terms and conditions of sale was never reduced to writing at United States Gypsum?

A. The authority that was granted to those, I do not recall it ever being reduced to writing. It could have been, but I do not recall it. It was not reduced in writing for me, although excerpts from the law and quotations were, laws. And I do not recall giving it in writing to anyone [12,840] to whom I delegated that authority.

[12,841] By Mr. FRICANO:

Q. All right. Then if someone were looking then through the historical files of U.S. Gypsum trying to ascertain what the policy of U.S. Gypsum was with respect to talking about prices and materials and conditions of sale in competitive situations with its competitors, the only written document that would afford that information is the one that you say can't do it?

A. Well, of course there are two different documents that we are talking about here. The document called "The Legal Aspects of Selling" dealt with a large part of the organization.

Verification, on the other hand, the authorization for it, dealt with a very small number of people to whom it was delegated.

Q. I understand, sir.

Perhaps my question was poorly phrased. Let me try again.

If someone were to look at the historical files of U.S. Gypsum in an attempt to ascertain what the policy of the company was with respect to what has been called by many witnesses in this case verification telephone calls, and other contacts of that character, the only written document relating thereto is one that says you can't do it?

[12,842] A. Well, that I could not answer yes to categorically because I testified that I just don't recall whether there were such documents. I don't recall any. I took my instructions from both my superiors and legal counsel.

Q. I understand.

All right, sir. Now you have testified that in your contacts with competitors—and, were they exclusively over the telephone with respect to this price checking?

A. Mine were.

Q. Exclusively?

A. Yes, sir.

Q. Do you know whether or not people working for you were doing it at social meetings?

A. I have never been in the company of anyone that did it, but I have heard some testimony from some witnesses that they said they did.

Q. Now, with respect to the Morgan document of February 13, 1962, which lays out a policy concerning competitive contacts, he says, in this memorandum——

A. What page are we on?

Q. I am sorry, sir. Page 3, page 3, the one where I read at length.

A. All right.

Q. And he says in this memorandum which you received, "• • • that the competitor may refuse to answer or may even [12,843] give an evasive or incorrect answer, but we are entitled to ask the question and to seek whatever information the competitor is willing to give."

Now, did you understand that to mean that the dialogue, the questions and answers between you and your competitors, were limited to yes and no's?

A. Those were my instructions with the authority I was granted.

Q. So your oral instructions were to limit your interrogation and to be interrogative only in terms of, "Yes, we do have that discount," or, "No, we don't have that discount," yet Graham Morgan, President and Chairman of the Board, said, "We were entitled to seek whatever information the competitor is willing to give"; is that right?

Mr. BARTLIT. Objection, Your Honor. The document in the same paragraph up above refers to precisely the kind of information that is involved here.

Mr. FRICANO. If Your Honor please, if Mr. Bartlit wants to have redirect examination of Mr. Watt on this point, I am sure——

The COURT. He wants you to go back to the other matter so that you can ask the question as to the whole proposition proposed.

It seems to me we have gone into the subject over and over and over again. Now I am going to give you [12,844] one more crack at it, then that it it.

Mr. FRICANO. I will beg the Court's indulgence and I won't take that crack, and I will just back off on something else.

The COURT. All right. That is fine.

By Mr. FRICANO:

Q. Is it your testimony, sir, that there was no agreement between you and your competitor to exchange this information?

A. That is correct.

Q. And while there was no agreement to do this, this practice that you have heard in this courtroom was industry-wide continued from at least as early as 1960 and in some instances right straight through 1973, and that is no agreement; is that right?

A. I don't agree with that statement that you made as being what has been testified to, but it is no agreement because I reserved the right not to reply. And that would make an incomplete agreement in my thinking, and not an agreement.

Q. An incomplete agreement?

A. Well, it is not an agreement if you are going to have reservations not to reply.

Q. Well, how often didn't you reply, sir, in the times that you did have such exchanges?

[12,845] A. I have no way of counting that, particularly to separate it, gypsum board from other things, nor can I count how many times I had calls. I just can't.

Q. Well, don't you have a record to rely on, Mr. Watt?

A. No, sir, I have no record.

Q. No written record?

A. No written record.

Q. Did your subordinates have a written record?

A. If they did, I never saw it, and not to my knowledge, and not by any instruction from me or from the attorneys.

Q. Well, did you ever instruct them either to keep written records of their contacts or not to keep written records of their contacts?

A. Neither one, no, sir, nor was I instructed either way.

Q. Well, didn't you testify, sir, that one of the purposes for making such contacts was to make sure that you were not in violation of the Robinson-Patman Act.

A. That is correct.

Q. Well, sir, you had green sheets for that purpose, didn't you?

A. Yes, we had green sheets; we had proposals; we had a number of things, price adjustment forms.

[12,846] Q. But no record of the competitor contacts?

A. No, sir.

Q. How can you account for that; can you?

A. We didn't need it. We had the documentation. The purpose here was to justify in our minds that we were in good faith meeting the competition. And if you come to that conclusion, with or without verification, then if a situation arises where you are accused of violating the law, those documents are available, those customers are available. So we felt we had an adequate defense.

Q. If you felt you had an adequate defense, sir, from looking at the documents, why did you bother calling your competitors?

A. Because sometimes the documents were—definitely you could tell by looking at them that they were so unusual that there was a possibility that the customer was misleading us.

Q. So while you painstakingly kept a record of green sheets and PA's, you did not in any size, shape, form or manner take your pencil and say, "Talked to Bill Duncan re this particular competitive situation"?

Mr. BARTLIT. Objection, Your Honor. It has been asked and answered at least three times.

The COURT. All right. You can [12,847] answer it at least one more, Mr. Watt.

The WITNESS. I am not sure that I did or didn't. Thinking back over all the PA's I have seen, and haven't seen, over the years, on all products, I am sure that we could find some that I made notes on, and a lot that we didn't. I can't say that we did not make notes.

By Mr. FRICANO:

Q. I though you had?

A. Well, I just can't say it categorically. There was too many papers involved, and there were too many years.

Q. Why did you refuse from time to time to respond to your competitors?

A. Because I felt it was in the best interest of the company.

Q. Would you explain your answer, please?

A. Yes, I can give it to you by an example situation.

Let's suppose we had an account that was split: in other words, Competitor A and USG had the account. Let's suppose that we were negotiating meeting the competition, increased competition, of Competitor A who may have lowered the price. We are trying to find out. And Competitor C, we will call him, would call me and ask [12,848] if we had such and such a situation. I would evade answering at that point because I was in

the middle of any negotiating we were going to do. That is a typical example of where I would evade it.

Q. You could have said no because you didn't have a deal.

A. We had a deal, but the point is that I would not have been able to answer it truthfully because I was in the process of negotiations. I have given this as an example.

Q. I understand, sir.

But if you are in the process of negotiation, how can you say you have a deal?

A. Well, I think I described that we had a competitive situation with Company A, and Company A—we got word that Company A is further reducing the price, which was not infrequent, and Company C calls me to ask if we have a price equal to what Company A is offering. I don't have that price. I am still negotiating. So I would evade answering the question at that point because even if I answered it, first of all, if I hadn't gone to lower discounts, I would be misrepresenting the facts; secondly, if I didn't, by refusing to answer it, I put myself in the position at least where we weren't cutting the same pie up three ways at that point. It was still only cut up [12,849] two ways.

Q. These customers that you evaded answering, what size were they, small, medium-size, large, or what?

A. Oh, I remember some of varying sizes.

Q. How about Wickles?

A. Wickes was one which I have a specific recollection of evading an answer, yes.

Q. Well, your instructions to Mr. Gimlin were not to give out information with respect to Wickes, were they not?

A. I don't recall instructions I gave to Mr. Gimlin. I only recall what I did myself in that situation.

Q. And did competitors from time to time refuse to give you the information?

A. Yes.

Q. Did they tell you why?

A. No.

Q. Did you assume in your own mind why they refused to give you the information?

A. I could only guess.

[12,850] By Mr. FRICANO:

Q. For the same reason you refused to give it?

A. I couldn't assume that. I don't know what they were thinking. If they said they didn't want to give it to me, that was the end of that.

Q. Do you know when you gave them information concerning the competitive situation that you were involved in, that they were going to make a business judgment based upon it?

A. If they asked me if I had a price?

Q. Yes, sir.

A. Well, I would assume they were going to decide something on the basis of whether or not they were meeting an actual competitive situation, or some misrepresented facts.

Q. And, of course, when you got information from them, you made a business judgment as to what you were going to do concerning a specific price or term in the marketplace?

A. I made a lot of business judgments concerning whether to meet competitive situations or not to, without verification.

Q. I realize that, but my question related specifically to the practice.

A. What is the question?

[12,851] Q. My question is: Once you obtained information from your competitors over this span of time, you made a business judgment on behalf of United States Gypsum, did you not?

A. I made a decision based on whether the price was fair, and they indicated it was, and assuming everything else, the business was worth it—the business was worth it, or I wouldn't have called—I made a decision whether to meet it.

Q. In each instance you made a call to check on a competitive situation were you sure in your own mind that if the competitor said yes, the lower price is there, you were going to meet it?

A. Yes, I had my mind—if the facts were there, I had made my economic judgment prior to making the verification, so if the facts were true, it was my intention to meet it.

Q. The facts as given to you by the competitor?

A. If he verified the situation existed, I met it.

Q. Did anyone working for you engage in the practice of checking out prices and found out the price was not there, but he went ahead and met it anyway, the false price?

A. I don't know.

Q. Would he have been authorized to do that, if he [12,852] did it?

A. No, I wouldn't think so.

You described the situation where he verified a price and found it was not there and went ahead and did it anyway?

Q. Yes, sir.

A. Well, I think he would be violating company policy, because the risk then would be that he would be discriminating, if it was that kind of situation.

Q. All right, sir.

Did you ever give an explanation when you were asked if you were cutting a price, when, in fact, you were? Did you ever tell your competitor why you were doing it?

A. No, I didn't think it was any of their business.

Q. Yet it was their business for you to tell them that you were, in fact, doing it?

A. That was a fact, but my reasons, they were my business.

Q. Weren't they factual?

A. Yes, but I didn't have to explain it.

Q. If your associates and your subordinates within the organization obtained explanations and both gave explanations, would that have been within the authority conferred upon them as you understand it?

[12,853] A. No, I wouldn't like that very much. If they gave too much explanation—I think the purpose has been well defined. I am not aware that anyone did that, but I wouldn't like it.

Q. Well, did Mr. Gimlin ever discuss with you the fact that in 1965 he called Alex McCaskill at Georgia-Pacific and spoke with Al Meyer, his associate, in an attempt to ascertain how you could get rid of an applicator discount in the Northwest?

A. No, Mr. Gimlin never discussed that with me. I knew nothing about it until I saw the documents here and heard it discussed in this courtroom.

Q. Was that within the verification policy, as you understood it at United States Gypsum?

A. I have to assume the documentation that has been testified to here is accurate. And if it is, Mr. Gimlin was clearly violating the policy and my instructions.

Q. Is it fair to say, sir, Mr. Gimlin believed from your conversations with him——

Mr. BARTLIT. Objection.

Mr. FRICANO. I will rephrase it.

By Mr. FRICANO:

Q. Did Mr. Gimlin, as your subordinate, report to you about what he was doing, both with respect to his effort to sell the product in the marketplace, and also [12,854] the conversations which he was having with his competitors concerning what you have described as verification and telephone calls?

The COURT. Mr. Fricano, Mr. Watt has just said he never heard of that proposition until here in court.

Mr. FRICANO. I understand that. I thought I was asking if he talked to Mr. Watt about the conversations he had, as distinguished from a specific one.

By Mr. FRICANO:

Q. Did Mr. Gimlin discuss with you the conversations he was having with his competitors under the so-called verification policy?

A. Not as a repetitive thing. If there were a situation that I felt uncertain about meeting, and he verified it and told me he verified it, and therefore I felt safe in giving my final approval—in most cases where the discount was a greater amount, I retained that authority—then I would sign it. I would know about it in those cases, but most of the time he didn't—he had authority to verify and he didn't—he had ground rules as far as how far he could go in meeting competition, so he functioned in that capacity. A lot of them I never heard about.

Q. Now, sir, I believe you testified on direct [12,855] examination at page 12,680 of the transcript you were asked the following questions and gave the following answers by Mr. Bartlit:

> Question. Mr. Watt, there has been testimony in this trial regarding price verifications. Did you have occasion to personally verify prices at any time after you came back with U.S. Gypsum in February, 1962?
>
> Answer. Yes, I did.
>
> Question. Now, why did you do that, Mr. Watt?
>
> Answer. Well——
>
> Question. What was your purpose? Excuse me.
>
> Answer. Two reasons. It had been explained to me without any question that if I had a request, a recommendation from the field organization for a price, to meet a competitive price, and that in order to comply with the good faith section or the good faith defense of the Robinson-Patman Act that it was completely legal for me to seek that information where I could get it, and, properly handled, I could ask competitors what their price was. So I did it for that reason.

That was your first reason. Then you said:

[12,856]

> The second reason is that I had been in sales and marketing and I had a lot of different capacities during my experience. And I was aware the buyers did mislead sellers occasionally. And so I verified to prevent being misled by somebody that was perhaps stretching the truth.

So you had two reasons. The first was to comply with the good faith leading the defense of the Robinson-Patman Act and your second reason was to protect yourself against sellers or buyers that may mislead you. Is that a correct recapitalation?

A. Yes, that is my testimony.

Q. Now, sir, on a prior occasion under oath you testified to the following questions as follows, and gave the following answers:

Mr. BARTLIT. Page, please, Your Honor?

Mr. FRICANO. Page 92 of the transcript of October 28, 1969.

This is not Grand Jury, Your Honor. I can't identify the proceeding any further than that.

The COURT. Go ahead.

Mr. FRICANO. By a different attorney.

> Do you remember verifying with Bill Duncan of National?
>
> Answer. Yes, sir, I do. That was [12,857] after he replaced Mr. John Brown.
>
> Question. Now when you verified in regard to prices, what would you do?
>
> Answer. Well, the first thing I would do is to have a report that I felt perhaps we weren't getting accurate information and this, many times, was after I had sent it back to try to get more information. It would appear to be an unusual situation, where I was concerned that if I met it and it wasn't accurate, I would be into two problems. One would be that it would be discriminating and strictly from a legal standpoint, that was a problem. And then, secondly, discrimination of that type from a

business standpoint could lead to problems with other customers where such a situation could exist. So those kind of things where they were serious enough or where I felt that the economic impact of the thing were sufficient and I was concerned about discrimination, then I would make a decision to call and ask do you have such and such a price with this customer.

Now, Mr. Watt, were those your answers and were those your questions in that proceeding?

A. Yes, sir.

• • • • •

[12,859] Q. • • • My question is this:

In your direct examination yesterday by Mr. Bartlit nowhere did you mention as one of the reasons for your checking out prices with competitors the economics of the situation. Why is that?

A. I think I did. I mentioned that a lot of times, before I even decided to verify I had to know whether the economics of the transactions were worthwhile. If I didn't testify to it yesterday, I did today.

Q. I just reviewed your testimony of yesterday, sir. There were two reasons. One was the Robinson-Patman Act and the other was so that you wouldn't be misled by buyers. Now is that the same thing as the testimony which I read to you on an earlier occasion, that you were concerned about the economic impact of the thing?

A. I don't see any conflict with it. This says the second reason here, and yesterday's testimony, that I had been in sales and marketing and had a lot of different capacities and I was aware buyers did mislead the sellers occasionally, so I verified to prevent being misled by somebody that was perhaps stretching the truth.

• • • • •

[12,860] Q. All right, sir. Before we go any further, can we have an identification of those persons with whom you checked on prices and terms and other services?

A. Do you want to start with 1962?

Q. Yes, sir, right straight through with each individual that you had such discussion.

A. And we will confine it to gypsum board products?

Q. Gypsum wallboard. That is what the case is about.

[12,861] A. Gypsum wallboard.

Q. Gypsum board machine products.

A. O.K.

National Gypsum Company, John Brown and Duncan, I believe when he replaced John.

Q. How about Ken Atwell?

A. I could have. I don't recall, but I could have.

Q. How about Jack Hayes?

A. No.

Let's take one company. Well, that is all I can recall at National.

Let's take G-P. Well, that gets back to Bestwall. I might have with Malcolm Meyer at Bestwall and I could have with Al Meyer when it became G-P. I am not sure. That is all I can remember.

[12,862] By Mr. FRICANO:

Q. How about McCaskill?

A. I don't recall verifying with him. You know, I knew McCaskill, and I met with him at meetings, but—and had other reasons to call him, but I don't clearly recall verification with him.

Q. How about Gene Burch?

A. No, I don't believe so, ever.

Q. How about at Celotex?

A. Marvin Greenwood.

Q. Don Miller?

A. I don't believe I ever verified with Don.

Q. How about at Kaiser?

A. Jim Hague.

Q. Harper, Claude Harper, the president?

A. No, no.

Q. Costa, the vice president?

A. I don't recall verifying with Bob Costa. I, again, have talked to him about other things, as far as paper sales and industry problems, but I don't recall verifying with Bob.

Q. How about at Flintkote?

A. The only one I can remember at Flintkote is Jim Moran.

Q. Johns-Manville?

[12,863] A. On gypsum board. I never verified with Johns-Manville.

Q. How about on—with respect to Fibreboard, otherwise known as Pabco?

A. Originally, it would have been Bill Spense, and I might have verified with White, although I am not sure. Mr. White.

Q. O. C. White?

A. O. C. White; that is correct.

Q. How about at Republic?

A. I don't recall verifying with Republic. No I really don't.

Q. How about at Texas Gypsum? Ted Armstrong, Sr.?

A. Yes, Ted Armstrong, Sr., verified with me on a couple of occasions. I don't think I have ever called him.

Q. Now, that Texas Gypsum is the organization which was taken over by Temple Industries after Mr. Huckleberry had left; is it not?

A. Well, it was Texas Gypsum. I am not sure whether Temple took them over, but I just remember it as Texas Gypsum, and the only person I remember there is Ted Armstrong, and that is about it.

Q. With respect to the people whom you have identified, was that a two-way street? Did they also call you and you [12,864] call them?

A. Not in all cases. As I said, I don't recall calling Armstrong. I think I recall his calling me for verification. I can't really recall whether I could classify all of those as two-way streets or not, because, again, I have difficulty on different products.

Q. All right, sir. Now, moving along, with respect to these conversations, did you testify, on direct examination, that you didn't have many in 1965?

A. Yes. I did testify to that, and the reason being that they were quite heavy in the early part of '65, and then, when we went on our program in May or June, where we were actually lowering the published price, I know I wasn't verifying, then, as best I can recall, because we were moving the prices downward. Excuse me.

Q. Is it your testimony, then, in 1965, because the prices were moving downward, and the situation was in a state of flux, so to speak, with respect to prices, that the occasion to verify was less?

A. Well, I think, prior to the time we established the so-called June plan or the new approach, which we put in the latter part

of May, early part of June—prior to that, there would have been some, but I don't too many on my part.

Now, I do know that, once we put the June plan [12,865] in, we were cutting prices, there wasn't much use in verifying every time we heard it—you heard it too widely—but you just dropped it, and, when you drop the zone, there is no reason to verify.

Q. In 1964, were you verifying then?

A. Yes, I would say I did some verifying in '64. In fact, I would say I did more in '64 than I did in '63.

Q. Now, page 81, on prior testimony, you were asked the following questions and gave the following answers:

> Question. And how long did you verify infrequently?
>
> Answer. Well, I would say that, probably, the heaviest pattern of where I was—of where I was verifying is in the latter part of '64 and '65, and I might have two or three such calls in a month, and I might have several months where I didn't have any.

Were you asked those questions, and had you given those answers?

A. Yes. That is correct.

Mr. BARTLIT. I will stipulate to that, Your Honor.

By Mr. FRICANO:

Q. Now——

Mr. MCSWEENEY. Well—excuse me.

[12,866] I move it be stricken because there is no purpose whatsoever in reading that. It was not inconsistent.

Mr. FRICANO. If Your Honor please——

The COURT. What was it inconsistent with that the witness testified?

Mr. FRICANO. He said he had very few price verifications in 1965, and this testimony says that the pattern was the heaviest in '64 and '65.

Mr. MCSWEENEY. Do you have a motion? Do you want me to speak to it?

Mr. BARTLIT. Go ahead.

Mr. MCSWEENEY. The witness testified that, after the so-called June plan, in May or June of '65, he didn't verify, but he said he verified, '65, the first part, and '64, just the way he read.

The COURT. The motion to strike will be granted.

• • • • •

By Mr. FRICANO:

Q. How did you learn whom to contact at your competitor [12,867] companies with respect to the so-called practice of verification?

A. In my case, the individuals were identified for me by my superior.

Q. Well, how did you learn to contact John Brown?

A. From Mr. Sadler.

Mr. FRICANO. All right.

May I have just a moment, please?

[Examining documents.]

By Mr. FRICANO:

Q. Page 114 on a prior occasion, with respect to how you learned how to contact John Brown, were you asked the following questions, and did you give the following answers:

"Question. At National, by what method did you ascertain which gentleman you should call?"

Your answer. "Well, in the early period, John Brown was the key person. In other words, he was my counterpart at National Gypsum Company.

"Question. How did you ascertain this information?

"Answer. I knew that from my association with John Brown in the National Gypsum Company, for years, through other groups and through the Gypsum Association."

[12,868] Was that—were those questions asked you, and did you give those answers?

A. Yes, I did, and I don't see that it conflicts.

Q. Didn't you just say you learned how to contact John Brown through Mr. Sadler?

A. That is correct, but I had met Mr. Brown long before 1960, in a number of associations, along with Mr. Sadler, so there is nothing inconsistent about my statement.

Q. Now, you say, in 1965—I withdraw that.

You said, in 1968, that you agreed with Mr. Baldwin and someone else—it escapes me at the moment—that they should stop checking out prices, terms, and services with competition; did you not?

A. They recommended it, and I suggested that we clear it with the attorneys, and I authorized them to cease. I didn't agree with them. I authorized their stopping.

Q. Did you clear this through Mr. Morgan?

A. Yes, I believe I did, and—I believe I did. I told him the reason, as I recall it.

Q. Now, you said that, thereafter—excuse me.

You said the reason why was because the market was becoming chaotic again, from a pricing standpoint, and the information was so diverse there was no way to check it out.

Mr. BARTLIT. I object to that as an incomplete characteriaztion of the record. I think there [12,869] was more to it than that. It would take quite a while to summarize it.

By Mr. FRICANO:

Q. Was that one way to summarize it?

A. There were a number of reasons, and, of course, we had delegated pricing authority to our divisions, at that point, to some degree, and, if you multiply the prices where we delegated authority by the number of services of Georgia-Pacific activities, it became kind of a useless exercise. You couldn't keep up with it, and the effects of discrimination were lessened because the market was moving faster.

Q. But, nevertheless, when you received verification on this, you did testify, on certain occasions, you would consult with your attorneys on these situations?

A. On some occasions, when there was real, serious difficulties.

Q. Well, back in 1965, when the market was chaotic, why didn't you use your attorneys, instead of calling your competitors?

A. Well, for one reason, in 1965, when it was chaotic, we made a different decision. We decided to get aggressive and lower the prices by zones. But I didn't need to verify it once we got the information the market was down. We just lowered it.

[12,870] Q. Didn't you have subordinates of yours, sir, in 1965, who were checking out prices and terms and services with competitors?

A. I think some of my subordinates were, in 63; sure.

Q. My question is, if you could use your attorneys in 1968, after you decided to stop, according to your testimony, why didn't you do that in '65?

A. The only situations we referred to the attorneys in 1968 were those situations where it would appear that there was a possible rising of discrimination and we wanted their opinion, and I think I testified we sent many of them back and didn't

need them, for that very same reason: our proof was not adequate.

Q. With respect to your having sent a memorandum to various people, which is Government Exhibit No. 23——

Mr. FRICANO. May he have that, Mr. Grainer, please?

By Mr. FRICANO:

Q. While Mr. Grainer is getting that, I will describe it, Mr. Watt.

This is a memorandum dated February 13, 1969, written by you to all U.S.A. corporate and division marketing policy personnel listed below, and the subject is, "Questions from Competitors," and it is this memorandum that states, [12,871] in the first paragraph, as follows:

> Recently, the Supreme Court of the United States, in the case of Container Corporation of America, held that a practice of exchanging price information in the container industry violated Section 1 of the Sherman Act. It seems clear that the practices in the container industry are not practices which we have in any industry in which we are engaged.
>
> Nevertheless, we have decided it would be prudent, until the situation is clarified, to avoid asking any competitor about his price, terms and conditions of sale in any particular market or to any particular customer, and also to refrain from answering any similar inquiries from competitors.

Now, is it your testimony, sir, with respect to this document, that this wasn't meant for the Gypsum Division?

A. It had no application to the Gypsum Division because they had already stopped verifying, but, in a letter of this type, which is informational as well as instructional, I sent it to everybody I thought needed it.

Q. You included on your listing people who are only involved with gypsum; did you not?

[12,872] A. Yes, because these people—for example, Weiser would spell off Swenson and Splittorff, on non-gypsum products, on occasion.

I wanted everybody to know the company position on all products.

Q. Excuse—excuse me. I am sorry. I didn't——

A. The other thing is Weiser also had plaster responsibility.

[12,873] By Mr. FRICANO:

Q. Why didn't you send a letter in the fall of 1968 and the summer of 1968 when you decided that your subordinates should stop verifying? Why didn't you send a letter to all your district personnel, your regional managers, your Mr. Buschs and you—well, all of your four divisional regions which were responsible for gypsum wallboard?

A. Well, because we had made the decision that they were not going to verify. They didn't verify. The people that were supposed to be verifying or were authorized to verify on gypsum board were in Chicago at that point. And they had recommended that we stop it.

Now, that didn't mean that there were not people out in the divisions who were not verifying on other nongypsum products. So, I didn't send out any letter, we just stopped it where it was. In '68.

Q. Did you contact them orally?

A. Contact whom orally?

Q. The field at this time when you made this decision.

A. Mr. Baldwin and Mr. White came to me with a recommendation to discontinue verifying on gypsum board. We checked it with the attorneys. We decided to do it. And they handled the instructions from there. I didn't do anything else.

Q. And, of course, Mr. Galvin is one of the people [12,874] who was instructed not to do anything further, was he not?

A. I don't know. I didn't do the instructing. He is on here.

Q. Did you notice, sir, that this was produced pursuant to a subpoena directed to your corporation that called for just documents relating to gypsum products?

A. No, I did not know that.

Mr. KECK. Your Honor, I think that's a misstatement of the record.

The COURT. Well, I think it is an improper statement and I instruct the jury to disregard it. That has nothing at all to do with what anything Mr. Watt did, and it was an improper thing to state to him.

The subpoena was not complied with by Mr. Watt, it was complied with by lawyers, and you know that. That was not a proper question to ask Mr. Watt.

Go ahead.

Mr. KECK. My point is, Your Honor, the subpoena asks for the specific letter.

The COURT. It did?

Mr. KECK. Yes, sir.

Mr. BARTLIT. I object to Mr. Keck's objection.

The COURT. Did the subpoena ask for that specific letter?

[12,875] Mr. FRICANO. No, Your Honor. It was not produced originally, and we sent a letter to Mr. Keck saying this should have been—we understand it exists, and it should have been produced under the second subpoena.

The COURT. That compounds what is improper about asking the question, if you specifically asked for that letter. And I have asked the jury to disregard it.

* * * * *

Q. Mr. Watt, in addition to prices and terms and conditions of sale, what services were authorized to be verified?

A. Well, prices and terms and conditions of sale I would think pretty well cover it.

Q. Well, how about method of delivery, trucking versus rail?

A. Well, I'd kind of consider that terms and conditions of sale, I thought you were encompassing that.

Q. Oh, I am sorry.

And would prices and terms and conditions of sale also include such services as packaging and handling?

A. If there were a competitive situation that seemed to indicate that we have a problem whether to decide to [12,876] meet it or whether it was actually true, I would consider that something.

Q. I see.

Now, you know a Mr. Lane; do you not?

A. Yes, sir. George Lane.

Q. He was your West Coast man?

A. Yes. George, earlier in my period, was in Chicago on another assignment. But in the recent years we are talking about he was on the West Coast, you are right.

Q. Before we get to Mr. Lane, one other question with respect to the types of contacts with competitors.

When you agreed with Mr. Baldwin and others back in—according to your testimony—back in the summer of 1968 that you should stop checking out competitive situations in gypsum wallboard, did that also include credit?

A. Well, yes. The verification where there was competitive credit terms was carried on by the same people, so we stopped it all.

Q. Well, did not the general credit manager and those within his department—if that's the right terminology—also engage in checking out competitive situations with respect to extended terms?

A. Not to my knowledge. They did check, I think, credit. You know, the credit standing of a customer. But not to my knowledge did they check the terms and conditions [12,877] of sale.

Q. Was this authority to check terms and conditions of sale—that is, when there were deviations or reported deviations—limited to the price and policy people?

A. Yes. Those were the people that reported to me, and they handled it.

Q. Do you know, sir, whether or not Mr. Lane, and possibly others within United States Gypsum who were not a part of the Chicago operation, knew that from time to time you, and possibly others, were contacting competitors with respect to competitive situations in the marketplace?

A. Well, I don't know that. Of course, Mr. Lane had some—he reported at one time to Mr. Gimlin. But I couldn't say with any assurance that Mr. Lane knew that I was verifying.

Q. I see.

I am going to show you a document which has been marked Government Exhibit 121, and this is not in evidence as yet.

This is a facsimile of the second page, so it makes it easier to read. It is a little bit faint.

A. Okay.

Q. And it is a document composed of 3, 4, 5 pages. The routing slip on the front says it is from Mr. G. V. Lane, and it is dated December 21, 1964, and it is directed [12,878] to Mr. Stanley, I believe, Crowley. Excuse me, Crowley. My copy is a little bit faint.

A. So is mine, but I think that's Crowley.

Q. That is your type of routing slip; is it not? Or, is it one of the types that you employ?

A. No. It looks like a homemade one.

Q. Homemade one?

A. Because it has only people typed on it from Western divisions. And—well, it says Gimlin on there. This is a homemade deal.

[12,879] Mr. BARTLIT. Are you just offering the cover sheet or the whole shooting match?

Mr. FRICANO. The entire exhibit, Your Honor. I said it was comprised of five pages.

Mr. BARTLIT. Well, Your Honor, I don't know anything about this handwriting on there. I think probably the witness ought to identify the handwriting, and that sort of thing. That has been our custom in court. There is a lot of pages here.

Mr. FRICANO. If it's an authentic document and the writing was on it when we obtained it.

Mr. BARTLIT. I don't think it has been authenticated.

By Mr. FRICANO:

Q. Well, would you glance through the document.

The COURT. I haven't heard anything about it.

Mr. FRICANO. Yes, sir.

By Mr. FRICANO:

Q. Would you glance through the document, Mr. Watt, and tell us whether or not, based upon your examination it, that these are documents which are from United States Gypsum?

A. Yes.

Mr. KECK. I think the record [12,880] ought to show that we did not furnish this to the Government. It does not bear any stamp.

The COURT. I have no idea what it is. All I know is there is a routing slip on there that was homemade.

By Mr. FRICANO:

Q. Well, after you go through it, sir, I will ask you some further questions.

[The witness reads the document.]

Mr. FRICANO. If Your Honor please, I wish to interrogate Mr. Watt as soon as he reads the document on certain portions of it.

Would the Court care to see this, and I will give it to the Court, a copy, a typewritten copy, of the second page because it's a trifle faint, and it is in longhand. This is a copy of the second page, Your Honor.

The WITNESS. May I ask a question, Your Honor?

The COURT. Wait. I am trying to see what this is.

All right, now.

Mr. FRICANO. I am going to try to qualify it now, Your Honor.

The COURT. All right. Go ahead.

By Mr. FRICANO:

[12,881] Q. Now, with respect to this document which is five pages in length, sir, do you recognize the identity of the individuals whose names appear on there both as authors and those receiving the document, both addresses and addressors?

A. Yes, I recognize the names. I haven't seen the document before that I recall, but I recognize the names.

Q. Mr. Lane in 1964, the date of this document, was an employee of U.S. Gypsum, was he not?

A. Yes.

Q. It has been so stipulated.

A. Yes.

Q. And Mr. Crowley was an employee of U.S. Gypsum?

A. Yes, in fact every one on this was employed that I can find the names of, with the exception of Mr. Fatterer who had a copy of it.

Q. And you are mentioned inside the document, are you not?

A. I am mentioned, but it seems to me a series of backward and forward correspondence between members of a western group. I didn't get it, and don't——

Q. Have you ever seen this before, sir?

A. No, sir.

Q. You have never seen that document before?

A. I don't think so. I don't recall it.

[12,882] Mr. FRICANO. Now, if Your Honor please, may I show the witness a document in an attempt to refresh his recollection as to whether or not he has seen it before?

The COURT. Oh, go ahead.

By Mr. FRICANO:

Q. I show you a document which——

The COURT. Well, just show it to him.

Mr. FRICANO. Right.

May I point to where——

The COURT. Yes.

Mr. BARTLIT. Could I just take a look at that, Judge?

The COURT. As soon as Mr. Watt is finished with it.

Mr. BARTLIT. Yes.

The WITNESS. May I ask a question? Is this 50–A at the top?

Mr. FRICANO. That is insignificant. That has nothing to do with it.

The WITNESS. All right.

Mr. FRICANO. I may have misspoke. I think the 50-A does have something to do with a description of a certain piece of paper in that refreshment [12,883] document that I just gave you.

The COURT. Give this to Mr. Bartlit so he can see it. This was the copy that was furnished me, Mr. Bartlit—oh, no. I am sorry. That is a different matter.

Now, all right. The question was what, Mr Fricano, "Does that refresh your recollection?"

Mr. FRICANO. Yes, sir, as to whether or not he has seen Government Exhibit 121 before.

The COURT. All right.

Now you answer that yes or no. You remember you heard me define what is meant by refreshing of recollection.

The WITNESS. Yes.

I recall seeing it before and being questioned about it.

Mr. FRICANO. I offer the exhibit.

The COURT. It is admitted.

Mr. FRICANO. With respect——

The COURT. Wait a minute.

Do you have an objection, Mr. Bartlit?

Mr. BARTLIT. Yes, sir. Just because he recalls seeing it before is not a sufficient foundation for the document.

The COURT. Do you want to lay a foundation? I have looked at this document, as I think [12,884] you have, and it seems to me it is clearly admissible. If you want the foundation, we will lay it. We will have it done.

Mr. FRICANO. Do you wish me to proceed further, Your Honor?

The COURT. Mr. Bartlit wants you to lay a foundation.

Mr. FRICANO. All right.

By Mr. FRICANO:

Q. Do you recognize, for example, the signature on the first page?

A. G. V. Lane.

Q. Yes, sir.

A. Yes, sir.

Q. That is his writing, isn't it?

A. As I recall it, yes.

Q. And on the second page, without getting into the contents of the document, sir, the initials of the person who is sending it are "J. R. A."

Now, there is a stipulation in this case between the parties that there is a John R. Anderberg who in 1964, the date of this document, was dealer-sales manager, Western Region.

Do you recognize the handwriting there generally?

A. No. That I have a little trouble with. I mean, [12,885] you say it's J. R. A., and I don't recognize the writing, and the J. R. A. isn't too clear, so I can't say that that is his writing with any assurance.

The COURT. Don't you want to qualify this, lay a foundation to qualify it, so I may rule on the admission?

Mr. FRICANO. I am trying to. I may not be doing it very artfully, Your Honor, but I am trying to.

By Mr. FRICANO:

Q. Is the signature on the first page which you have identified as G. V. Lane the same as the signature on the third page which is dated November 27, 1964?

A. Third page?

Q. Yes.

A. November 27.

Q. Yes, where it says November 27, 1964, right above it there is a signature.

A. Oh, I see, the followup signature.

Q. Yes, sir.

A. Yes, that looks like the same signature.

Q. Of Mr. Lane?

A. Yes.

Q. And as you have testified, the people who are referred to within the document, the integrity of the [12,886] document itself, the substance, and the people to whom the document was directed, and the officers, were employees of U.S. Gypsum in 1964?

A. Yes.

Q. And you do recall having seen the document before, and you were questioned on it?

A. Yes, but I didn't see it in the ordinary course of business, and I was questioned on it.

Mr. BARTLIT. I would object on the grounds of a proper foundation not being laid.

The COURT. Sustained.

There is no foundation until you do it, and if it's objected to, I am going to sustain the objection.

Mr. FRICANO. Let me ask——

The COURT. Mr. Fricano, you know how to lay a foundation.

Mr. FRICANO. Apparently I don't.

The COURT. Do you want to let Mr. Thorson take a crack at it? Maybe he can.

Mr. FRICANO. I would be delighted if Mr. Thorson can do it because I certainly can't.

Do you want to take a crack at it?

He says he doesn't want to.

[12,887] By Mr. FRICANO:

Q. Were documents of this type and character prepared by your subordinates in the normal course of business within United States Gypsum Company?

Mr. BARTLIT. Objection, Your Honor. There is no showing this man who wrote this was his subordinate.

The COURT. Can you answer the question, Mr. Watt? Is this the kind of document that was prepared and maintained in the ordinary course of business by United States Gypsum?

The WITNESS. It is a series of memoranda that deal with a number of situations and they seem to be writing back and forth to each other to find out information.

The COURT. Is that what would be done——

The WITNESS. I think that is normal in business, but as I said, I did not see these documents in the normal course of business.

Mr. FRICANO. I offer the exhibits.

The COURT. It is admitted.

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[12,888] Q. All right, sir, this exhibit 121 has a buck slip note attached to it that is dated December 21, 1964, and it relates, the exhibit as a whole relates to a situation on the West Coast where Fibreboard, one of your competitors out there, was starting to truck in a non-trucking area, does it not?

A. Well, as I read it, it relates to a whole group of customers, some of whom were getting truck delivery from Fibreboard and had from 8 to 10 years.

Some weren't getting it because they didn't want it. The first letter is just—I would have to describe it, if I received it, as mish-mash.

Then the second letter that was written by Crowley to Frankling and Crowley writes to Frankling again and now he has got it down to one customer and then the buckslip is written and I don't know who this—whether it is [12,889] Anderberg or not—writes to Lane and you have given me a transcript of this, which I have read, and then the top sheet just returns the whole thing to Crowley. Lane returns it to Crowley and says,

Return to me with your written report.

Q. Sir, my question—perhaps I didn't——

Mr. BARTLIT. Your Honor, I would object to the interrogation of the witness on a document which he never saw, which he never saw in the ordinary course of business, which he cannot identify the specific document as being prepared in the ordinary course of business, since it was out on the West Coast, and to which the handwriting is not thoroughly identified.

The COURT. I have not heard the question yet.

Mr. FRICANO. Perhaps I can frame the question so Mr. Watt——

Mr. BARTLIT. I object to the line of questions, so the Court is aware of my position.

By Mr. FRICANO:

Q. The buckslip note on the second page for which you have been provided a facsimile from J. R. A. to Mr. C. V. Lane states,

> I see the serious potential of all this, but why must we stand still for Pabco trucking? Can [12,890] Watt explore and let them know the implication of their action? From a sales standpoint we cannot ignore 500 to 750 million square feet of business.

Did Mr. Evans—excuse me—Mr. Lane contact you and ask you to call Mr. White of Fibreboard to explain to Mr. White of Fibreboard because of his trucking on the West Coast there was serious implications?

A. No, sir, he did not.

The COURT. Bear in mind this is a suggestion by one man to another man and Mr. Watt was not in on it. He says he never did get into it.

By Mr. FRICANO:

Q. Was trucking one of the types of competitive situations which normally would be checked out, if there was some doubt?

A. Well, I don't—I wouldn't know, because if someone is trucking, I think a salesman could find out pretty quickly whether the material is being delivered by truck.

Q. So there is no necessity of checking it out over the telephone?

A. If he couldn't find the evidence of it and the customer claimed he was getting it by truck and couldn't afford to stand around all week to see if the truck came in with material, I guess somebody might ask, but it is not clear to me why you would bother.

[12,891] Q. How about whether or not someone—when I say someone, I mean a competitor, sir—were trucking into an entire area or zone, would that be the type of situation that could be checked out under the verification procedure you followed?

A. I think if someone were trucking an entire zone, I think we would know it before it got around to the whole zone.

Q. So there would be no necessity?

A. No.

I might add I hope our salesmen could do that.

Q. In that connection, sir, couldn't your salesmen go back to a job from time to time to make sure that if you were selling board to a dealer under a job price protection deal, he wasn't defrauding you by using not only your board, but someone else's board?

A. If the job were of sufficient size, it seems to me that I would be a little irritated with a salesman who would not make regular calls, not only for the purpose of seeing we were getting the business, if that is what we committed ourselves to, but to service the job.

A job of any reasonable size, it seems to me that is how you maintain good customer relationships. You help the contractor and you go back, so you find out.

Q. Why would you bother to call your competitor to [12,892] find out whether or not he had job price protection on a particular job if, as you say, the salesmen could go back and check it out?

Mr. WARNKE. Objection, Your Honor. He is with two different periods of time.

The COURT. I do not understand the objection.

Mr. WARNKE. If I might explain, Your Honor, as I understand job price protection—and I have had it explained to me several times by Mr. Watt, among others—it involves an offer by one supplier to guarantee the price on the job for the duration of a job.

That offer exists before any construction work starts. So how could anybody check out until the offer had been accepted, or had been met, and how would you know whether one or two suppliers existed?

The COURT. I understand.

Would you clarify what period of time you are talking about?

By Mr. FRICANO:

Q. For the period of time where you and your subordinates were authorized to check out job protection——

A. That is correct.

Q. —— with respect to that period, did you not from time to time, and did not your subordinates first ascertain [12,893] whether or not job price protection was being extended on various and sundry jobs?

A. Yes, there were such verifications.

Q. And did you not, from time to time in this time period, extend job price protection to your customers?

A. Yes, we did.

Q. And did you not testify that one of your fears with respect to the extension of job price protection is that your customer would be getting wallboard from one of your competitors by misleading him in some regard?

A. I testified to that, that is correct.

Q. Now if that is true, and if your salesmen could very easily go back, and did go back to check out whether or not the contractor was being serviced correctly, could he not at the same time ascertain whether or not you were being defrauded by the use of somebody else's board on that job?

The COURT. Now that goes to Mr. Warnke's objection. When are you talking about, before the contract was awarded?

Mr. FRICANO. After the contract.

The COURT. Or after the contract?

Mr. FRICANO. After the contract.

The COURT. All right.

The WITNESS. Well, if there were a [12,894] job protected and it didn't take the material, or didn't need the material for 12 months, you can't check the job until the material delivery starts. I think we are talking about a decision to protect and then the matter of whether you actually got the board on the job or whether somebody else did. They are two different things.

Q. All right.

Mr. Watt, you have the job. You have protected the XYZ building for its life.

A. Right.

Q. Sooner or later you start bringing gypsum wallboard to that job.

A. Ours?

Q. Yes, yours.

A. All right.

Q. The salesman goes back and sees that United States Gypsum's wallboard is being used in that job and everything is fine, all right?

A. That is right.

Q. Now, during the middle of that job, if that salesman goes back and notices that Georgia-Pacific wallboard is being used or Celotex wallboard is being used, should he not report that fact to headquarters, because you may be being defrauded then?

A. I think the first thing he would do is go to the [12,895] contractor and ask how come. We have the order, how come Georgia-Pacific board is on the job.

Q. Does that happen?

A. It has happened to me, but it is so far back, I don't think it is relevant. There are many reasons that it can happen that are not defrauding.

Q. Mr. Watt, with respect to job price protection and your concern that you don't want to be fooled or hoodwinked by your customers, because if he has more than one source, cheap board may get out in the marketplace and erode the pricing structure, would it not have been just as easy to instruct your sales force to make checks and police those jobs to prevent that very thing?

Mr. BARTLIT. Objection, Your Honor, misstatement of the record.

The COURT. Well, when there is job protection, do you have a contract then with the contractor that he may not buy board from anyone but you?

The WITNESS. No, sir. Job protection works one way in terms of the contractor. He makes an agreement with us that he will buy the board for that job at a price. Now whether it is before a price increase or it is just a period of time that he thinks maybe he should be protected——

[12,896] The COURT. But does he have a right to supplement the board he buys from you with board from somebody else, is what I am asking—is there any rule he can't or any contract stating he can't?

The WITNESS. We think it is a moral commitment when he has given us the order for the job.

The COURT. I am not asking about a moral commitment. Mr. Fricano asked about fraud. I am asking whether he can't buy it from anybody but you.

The WITNESS. No, sir, he can change his mind.

By Mr. FRICANO:

Q. He is not bound, is he?

A. You can't bind him, because I have had situations where we have had job protection at a given price, and the price went down, and the whole battle started over again at a lower level.

• • • • •

[12,903] Q. When you exchanged information with your competitors, did you always answer truthfully?

A. Yes, sir, or evaded the question altogether.

Q. Did you instruct your subordinates, who were engaging in this practice, to answer truthfully?

A. Yes, or to evade, if that was the proper position to take.

• • • • •

[12,907] • • •

By Mr. FRICANO:

Q. Could it also happen, sir, that one customer is paying more than another customer because he didn't—he doesn't know that another customer in the same marketing area is getting a better deal?

A. It is possible.

Q. Given the verification system, which was extant in the industry, where one customer who was being serviced by United States Gypsum, and another competitor, you received a report that that customer was getting an offer of a lower price?

A. Yes.

Q. So you meet that price to that dealer say in Pittsburgh or esome other city; whereas, the dealer's competitor—maybe on the other side of the city—because he doesn't know of that situation and wasn't allowed to engage in it, so to speak, pays a higher price when he places the same order on the same day?

A. Yes, that could happen. It was one of the problems that positions, which is part of the Antitrust Laws, has presented. It brings up that problem.

Q. Now, in the situation that I have just described, the example that I have just described, if the customer on [12,908] the other side of the city who is paying the higher price knew that his competitor on the other side of the city was getting a lower price, he wouldn't be very happy about that; would he?

Mr. WARNKE. Objection, Your Honor, on the grounds of relevancy.

Mr. FRICANO. I am laying a foundation, Your Honor.

The COURT. Well, I think it is pretty obvious, Mr. Warnke, he wouldn't be happy about that.

Mr. WARNKE. I think it is very obvious, but also I think it is very irrelevant, Your Honor.

The COURT. I don't know where we are going.

Mr. FRICANO. Well, I am trying to lay a foundation, Your Honor.

The COURT. Let's hear the question.

Go ahead.

By Mr. FRICANO:

Q. Now, the dealer who didn't know, did not have access to that information. However, your competitors had access to information of that type and character; did they not?

A. With respect to the account that we might have verified, only what they knew about the other account.

• • • • • •

[12,910] • • •

Q. Now, you did use cashier's checks and credit memoranda throughout the period from 1962 though 1973 from time to time; did you not, sir?

A. We have used credit memoranda for various things as long as I can remember. I would not categorically say that we'd use cashiers' checks as a regular thing through that entire period, no.

Q. But from time to time you did?

A. From time to time, that's correct.

Q. When you used the credit memoranda or you used the cashier's check, in those instances the face of the invoice did not show the actual price that the customer [12,911] was paying; did it?

A. No. It would not show the price perhaps that we had agreed to sell him.

And, many reasons for that, sometimes the salesmen would have approval. The order would get placed, the car would get shipped, and we are still processing papers back through the Billing Department to make the correction. So that there were a number of reasons for that.

But you are right, it would show the list price, and the credit memo would come along and adjust it downward.

Q. Or a cashier's check would be provided directly to the particular customer involved?

A. Well, cashier's checks were provided in two situations. One—Well, the number one reason was that the customer wanted it that way.

But then you had the other situation where a contractor who did not buy from you—In other words, let's say in market "A" that we were selling dealers, and we were doing fine. And, a job comes along that a contractor has, and a competitor goes to the contractor. He can't crack into the dealer. He can't break that one, because it is loyal and the guy won't change. But he will go to the contractor and say, "If you try to force [12,912] my board through this fellow, we will give you a discount." And the birth of cashier's checks came about that way, or check payment, whether it be cashier's checks or any other kind. Because we had no account with that man, if we met that situation, we had no account with him, so how could you give him a credit memo when he doesn't owe you anything? He isn't buying from you, he is buying from the dealer.

So, if you pay him, or you meet this competition to try to force the business back through the dealer, you got to send him a check. That's the only way you can do it.

Q. You can send him a United States Gypsum check; couldn't you?

A. And we did on some occasions. But if they wanted a cashier's check, we sent him a cashier's check.

Q. Did you only use a cashier's check in that situation, or did you also use a cashier's check in normal transactions with dealers?

A. No. There were cashier's checks with some dealers, to my recollection.

Q. Now, when you used a credit memoranda or a cashier's check with your dealers, and the invoice price showed a higher price, if that invoice got out into the marketplace no one would be able to know; would they?

[12,913] A. Know what?

Q. Know that you were in fact charging your customer a lower price than that appearing on the invoice.

A. Well, if that's all they got to look at, they would, I guess, assume that they were charging the price they saw on the invoice. But I don't know what competitors did. But I know when I was running the sales force, I know what I asked our people to do, and that was dig deeper than the invoice. See if you can get something else.

Q. Now, a credit memoranda by and large doesn't relate up to any particular sale; does it?

A. Oh, yes, they can.

Q. Well, they can; but do they?

A. Generally a credit memo has a reference number that relates to an invoice. At least it does in our company. I don't know what the rest of them do.

Q. And, of course, a cashier's check is untraceable?

A. Oh, I don't know that it is completely untraceable, but it is pretty hard to find out.

Q. Now, when you used a credit memo or a cashier's check with a customer, if one of your competitors got his hands on that invoice he would not know that there was a lower price; correct?

A. Well, I think I just went over this. If he [12,914] didn't see anything but the invoice, that's all he'd know.

Q. If he called you on the telephone though and said, "Mr. Watt, I have seen an invoice and it shows a high price, but this dealer tells me—" Or, "I have got word from somebody that your company is actually giving him 5 per cent under that price." you would then provide that information; wouldn't you?

A. Yeah. I think if we were—we actually had a discount in—See, it didn't make any difference whether you had an invoice that wasn't matched up with the CM. In our case, if we had a price adjustment, it eventually would get that price, to whatever we had agreed to do. That's it. Usually we were meeting somebody else.

Now, if he called and said "Do you have this price?" I probably would either answer him or refuse to answer him.

[12,915] By Mr. FRICANO:

Q. Well, I am asking you, sir, is it fair to state that when you had a credit memorandum taking care of cut prices or discounted prices, and cashier's checks which did the same things, that if your competitor called you with respect to that situation and he found out that in some way that you were offering 5 per cent under the invoice price, you could tell him, you would confirm it or deny it as the case may be?

A. Yes. Well, either confirm or deny it, or refuse to answer it.

* * * * * *

[12,942] * * *

Q. Now, on July 14, 1965—which was some two months after Georgia-Pacific had acquired Bestwall—you had a meeting with Mr. Hunt; the President of Georgia-Pacific; did you not?

A. I had some meetings with Mr. Hunt. I had known [12,943] him for quite some time. I didn't—I still don't have a clear recollection of the meeting, but I may have in June.

Q. Yes, sir.

Government Exhibit 1911, which is your expense report which is in evidence, shows a meeting with Mr. Hunt on July 14, 1965. And, it shows that you were in Portland at that time and you claimed business expenses.

Now, what did you talk about? Do you remember?

A. Well, that was what I said, I didn't have a clear recollection. I was in Portland, as I recall. There was a Home Builders Association Meeting there.

I also visited with our people. We had a situation with Mr. Nieman, our division manager there; and, review of some contemporaneous documents would lead me to believe that I visited with Mr. Hunt. But I don't recall all of it.

Now, there are things that were relative at that time that I could have talked to him about.

Q. All right, sir.

Mr. BARTLIT. Your Honor, I'd just like to correct the record. The particular expense account in question—and Mr. Watt is explaining what the expense account in question says—says L. Blackman, Portland House Builders Association, Benson Hotel, Portland. Breakfast re Research House. Now, his testimony stands; but the particular document Mr. Fricano mentioned doesn't say anything [12,944] about Mr. Hunt. It is only to correct the record.

Mr. FRICANO. Mr. Bartlit is correct. It is Government Exhibit 2001, which is Mr. Hunt's expense report which shows that at the time that Mr. Watt's expense report has him in Portland, Mr. Hunt, his expense report shows that he was meeting with Mr. Watt.

The COURT. All right. We have had the testimony on it, so we don't have to go back over it.

By Mr. FRICANO:

Q. Now, sir, the record in this case also shows that on July 1, at or about July 1, 1965, Georgia-Pacific was the first to announce price increase on fire-rated board, and the price increase was about four dollars per thousand on half-inch fire-rated board and five-eighth inch fire-rated board.

Did you discuss that price increase announcement with Mr. Hunt?

A. No, sir, I did not.

Q. Now, the next day, on July 15th, your expense report—Government Exhibit 1911—shows that you had a meeting with the President and Vice-President of Kaiser Gypsum, Mr. Hague and Mr. Costa.

Did you discuss at that meeting Georgia-Pacific's announcement of a price increase of $4 per thousand on fire-rated board?

[12,945] A. No, sir, I did not.

Q. Did you discuss any prices at all?

A. No, sir.

I withdraw that. I think we discussed prices on some paper that we were selling or trying to sell.

• • • • •

[12,950] Q. • • • Going back to Ponte Vedra. Was the fact that there was in existence in the marketplace extended terms a subject of discussion and concern to the people there?

[12,951] A. No, I don't recall extended terms being mentioned at all at the Ponte Vedra meeting.

Q. Do you recall any discussions concerning credit problems?

A. Well, I recall that even back—in fact, I went back and reviewed some of the records of the Gypsum Association, that back as early as 1960 there was a recommendation made to establish a task force, I guess it was, to study whether we should have a credit committee. It came up in this period of time that I was active in the Association on a number of occasions as one of those things, "Should we have a standing committee of this type?" So again I know that these things were brought up on the official agenda. I don't recall that being a subject for discussion at Ponte Vedra.

Q. Now, later on in '66 it came up more specifically under your special marketing task force, did it not?

A. Yes, at some point during the preparation of the presentation of the task force the suggestion was made—I had made a number of suggestions of the kind of things I thought we ought to cover, and our objective, of course, was to cover them with the chief executive officers, and I think I had proposed three general areas, although two that were originally discussed we just went right ahead and did. They were prepare a book on what the Association [12,952] does, and the other one was to reexamine our product standards that had been approved through the Department of Commerce, and that got done. And then at some time during the preparation and prior to the final script and slides, was presented the question, and this was all presented in a way as, "Here are the problems. Here are some things we see that we can do." And we posed the question as to whether they will be interested in pursuing these things. And a credit committee was again brought up.

[12,953] By Mr. FRICANO:

Q. And you receive an opinion from the lawyer who not only represented United States Gypsum, or was their counsel, but also the Gypsum Association counsel that the collection program contemplated might create some kind of legal problem, did you not?

A. We got that right away. It seems to me we made the presentation and it seems to me there was a questionnaire circulated by Mr. Abnee, or someone in the Association, because we obviously weren't going to get all the chief executive officers to express themselves on everything at that point, just because we raised the question. So there was kind of a survey made. Now whether—yes, some people had reservations.

Now, again, I don't know who, at this point, and I don't know which lawyers had that reservation.

Q. And the program with respect to credit, as contemplated, was merely the sharing of collection information, not the sharing of extended terms, wasn't it?

A. That was my understanding of all the approaches that were taken to credit. As I said, there were a number of them over the years, so this didn't come up as any great surprise. But my understanding was that the whole idea was to have an easier way of sharing the credit worthiness of the customers whom we sold.

[12,954] And again, I think we had an organization—I don't remember the name of it, but it is in the record somewhere, who were in the business of developing this kind of thing—give us a very lengthy report of how it could work. This is in the record somewhere.

Q. Then I guess the answer to my question is yes, it was only dealing with collection, not with extended terms.

A. I never really got into it as to what it was going to do, but my understanding and the way I posed the question in my presentation, I think was very clear.

Q. Perhaps I misspoke, sir. What is your recollection, because you were there at the scene, if you do recall that the program as contemplated by the Association was the exchange of credit information generally, but it was the attorney who said it must be limited to only collection, if at all. Is that your recollection or not?

A. I think we are talking about two different times.

At Ponte Vedra and during the stages I was trying to get people to pool together—I didn't get right at this Task Force thing. I had something else to do. I recall that Yeager and Abnee in the Association poked me about what I was going to do, since I was appointed chairman.

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I don't recall that at that stage credit was [12,955] part of what we were thinking about. It was not part of what I was thinking about.

Q. Now, after the October meeting at Ponte Vedra—this is 1965—there were a series of meetings back at United States Gypsum, internally now, in October and November, and at which time arising out of these meetings was a plan and program to announce what ultimately became the December 15, 1965 price increase, is that not correct?

A. That is correct. There were a lot of drafts and a lot of discusions trying to conclude what we should do, that is correct.

Q. And present during some or all of these meetings were yourself, Mr. Gimlin, Mr. Duffy, Mr. O'Brien and Mr. Morgan, the President and Chairman of the Board?

A. Mr. Price and Mr. Shaver sat in on a good many of them, too. And not all of us were in all of them. I mean, there were times when we just couldn't all make it.

Q. Now, at this time when you were considering—this is October-November, now—you were considering this price change, simultaneously with it you were giving consideration to a change in credit terms, too, were you not?

A. Well, I was not. I recall that there was some thought of that expressed by someone, sometime during that period, but I don't recall my personal involvement in [12,956] that.

Mr. FRICANO. May the witness have Government Exhibit 916, please.

By Mr. FRICANO:

Q. Do you have that, sir?

A. Yes, sir, I have it.

Q. This is in evidence and it has been identified as having been prepared in 1965 in contemplation of a credit change. It is entitled, "The Problem: Company Trade Receivables Are Extended."

And then it goes on for several pages to detail the kind of problems you were having with extensions of credit and so forth at this time in 1965. Do you recognize the handwriting on the second page?

A. It is too large to be Gimlin's. It is not mine. It doesn't look like Weiser's.

I don't think I can.

Q. It is not Mr. Duffy's?

A. No. No, I know Mr. Duffy's writing. This is not his writing. At least I wouldn't think so. He is a better writer than this.

Q. With respect to this document, in the fourth paragraph it states, "1300 customers (5 per cent)——

A. I am sorry. What page?

Q. Right on the first page.

[12,957] A. First page.

Q. Paragraph number four states, "1,300 customers (5 per cent) representing 25 per cent—30 per cent of sales have extended terms."

If we get an algebraic equation on that, could we find out how many customers you had in all?

The COURT. No, you couldn't Mr. Fricano. It represents percentage of sales, not customers.

Mr. FRICANO. It says 1,300 and then it say 5 per cent. The implication is 5 per cent is to 1,300 as 100 is to X.

The WITNESS. You would never get it to what they are talking about in terms of sales. You could have 5 per cent of the customers that represent 25 per cent of sales and you could go to 6 per cent and it might raise the sales another 10 per cent. I don't think you can do it that way. At least I can't.

By Mr. FRICANO:

Q. All right.

At this time prices were being considered and credit was being considered. Can you tell us why?

Mr. BARTLIT. I would object to that only because of the statement at this time. This particular document doesn't have a date on it and if Mr. Fricano can put a date on it, I will withdraw my objection.

[12,958] The WITNESS. The handwritten note says some kind of date of January 19, 1966. That is the only date I can find on it. So this would have been after the price consideration.

By Mr. FRICANO:

Q. You are aware, sir, that when you considered—when Mr. Morgan, in your presence in Greenville, Mississippi in November—November 10, I believe—1965, reported to the Board of Directors on the impending price increase, that he did comment on the fact that credit was also being considered at the same time, but it was felt by the marketing managers of the company that it would be too, in essence, too big a bite of the apple at that time to increase prices and to tighten up on credit terms. Do you recall that?

A. I don't recall that exact wording, but I recall his mentioning that problem. I don't think that relates to document whatever this is, 916.

Q. Sir, if you would look at——

Mr. FRICANO. May he have Government Exhibit 488, please, Mr. Grainer.

By Mr. FRICANO:

Q. Now that document, which is in evidence, are the minutes of the regular meeting of the Board of Directors at United States Gypsum Company held in Greenville, Mississippi [12,959] on November 10, 1965 at 8:30 o'clock a.m., and it shows on the first page that Mr. Morgan, and you, among others, are present, does it not?

A. Yes, sir.

Q. And if you turn to page 3, which is unnumbered on my copy—it may be numbered on yours——

A. It doesn't seem to be, but it is the third page.

Q. ——you will note in the second full paragraph, after reporting on the trend of company earnings and the plan which was designed to improve prices of gypsum products which had been approved by the executive committee, Mr. Morgan stated as follows:

> He reported that consideration was given to announcement of a program to improve credit and accounts receivable situation concurrent with the gypsum price move. This was deferred, however, as marketing managers were of the opinion that both programs would fail, if initiated at the same time. In the event the price move was successful, a program is planned to correct the credit situation as well.

Does that refresh your recollection, now, sir?

A. Well, it says what it says. He made that statement.

[12,960] By Mr. FRICANO:

Q. Well, do you recall that credit was being considered at this time?

A. Oh, yes, in terms of this. I accept this. This is a document of the company of board meetings. I accept what he said.

Q. So, is it your recollection now—having heard what Mr. Morgan said—the fact that you were present at that meeting, and by seeing the minutes themselves and hearing them read, that the credit change that you contemplated was entirely dependent upon the success with which your price move was met by the industry?

A. No. I don't recall that connection. What this would refresh my memory is, is that someone was suggesting that we do both at once, and someone felt that wouldn't work. But I don't see the relationship between the success of a price increase and a success of a credit change.

• • • • •

[12,964] Q. Do you recall, sir, that in the internal processes, the internal thinking of officials of United States Gypsm—including yourself—that in considering the strategy to be used in putting into effect this price change, that initially the thinking of the group was generally that January 1, 1966 should be the announcement date. And, that subsequently to that—or not subsequent to that—but as the process of the thinking of the group evolved they decided to move it back to November 15, 1965, and then that date was changed again to November 17, 1965, which was actually the date that the announcement first went out to the trade.

[12,965] A. Well now, the one thing I do know is the date the announcement went out. But during this whole period there are drafts and redrafts and corrected drafts and a number of changes in dates. That is not unusual in terms of trying to figure out pricing strategy on anything, because you do have problems in terms of, "Well, what are we going to do? Are we going to print these many price lists? Are we going to change zones?"

So that you never can be sure. So I think I can agree with you, there were a lot of dates discussed. I do not have any personal recollection of my state of mind about dates or any given date until we finally arrived at what we were going to do.

Q. All right, sir.

A. The thing was full of drafts, you know, and we both know that.

Q. All right.

Now, is it not fair to state, and isn't it the fact, that at one time the thinking of the group—again you, Mr. Morgan, and others—was that you would make the announcement on a public basis through the Wall Street Journal?

A. Yes, that was considered.

Q. Now, that wasn't done; was it?

A. No, it was not.

[12,966] Q. The first public announcement of that price change to your customers was on November 17, 1965, was it not?

A. Well, I am not—Well, that was when the letters were mailed. I think they were mailed prior to that, but we had meetings with our sales organization even before that to get ready.

Q. Yes. But the mailing which you once described as massive was on November 17; was it not?

A. I wasn't in the mailing room, but that was when I assumed it went out. That was my understanding.

[12,967] By Mr. FRICANO:

Q. Do you know why the decision was made not to announce the price change in the Wall Street Journal, and if so, by whom?

A. I can't say why because it was just—it was overruled by someone over me. So it would either have been Mr. Morgan or Mr. Shaver.

Q. Now, in November 5, 1965, the executive committee met in Chicago—that is Government Exhibit 487—and present at that meeting, among others, were yourself and Mr. Gimlin. And you both made a presentation to the executive committee at this time concerning your reasons for the implementation of what ultimately because the December 15, 1965, price change; did you not?

A. I think that is generally correct. We were not in at the beginning of the executive committee meeting. I think there was some other business transacted, and we joined them when it was our time to present this program.

The COURT. Mr. Fricano, in order to expedite things, I am going to make a ruling. You have until the recess at five minutes to eleven to ask whatever you want prior to the statutory period; thereafter, I am not going to hear any questions except what occurred within the statutory period. We have spent about

a day and a half on what happened in '62 and '64 and '65. We [12,968] are only going to hear another half hour of that.

Proceed.

By Mr. FRICANO:

Q. All right, sir. During the course of that meeting of the executive committee, it was noted, and it states on page 2:

> "The president then said that the principal purpose of the meeting was to discuss with the Executive Committee a very serious pricing situation in the gpysum industry which has resulted in a continuing decline of profit margins on gypsum products in 1965 and which, if continued would result in even lower margins of profit in 1966.

Thereafter, on the following page, you were called upon, according to these minutes, to make a presentation concerning the pricing change and how you intended to implement it.

And in brief summary this points out, does it not, that your first point was that you were to announce that you would sell only at published list prices, and then in certain zones you would raise prices, and in other zones you would keep them about the same.

And your point two was that the company would not meet the lower prices of single plant manufacturers, who account for a small portion of the industry sales.

[12,969] And your point three was that you would have implemented a job price protection register that would be available to competitors.

And your point four was that you would send every competitor a copy of the company's policy, and a list of those business commitments with respect to job price protection and point out that they would be listed with your accountants.

Does that comport with your recollection now, sir?

A. Well, your first comment was that I made the presentation. It was a divided thing. Mr. Gimlin made part of it, and I made part of it.

The other thing, your comment with respect to the seriousness of the pricing situation, I know that Mr. Morgan felt that our June, 1965, plan, where we had been aggressive and had been dropping prices, could have contributed strongly to the general decline because the size of our operation and the number of people we had out, and taking that attitude. I know he had the feeling that the June plan could have caused a precipitous drop in price. And we were talking at that point on the basis of what figures we had, and all our comparisons of what we might be able to do to reverse it were based on the low, very low monthly levels that we had reached.

So in general I will agree that those were the [12,970] points covered, but I wanted to make those corrections.

Q. This was the first time in the history of the company, as far as you know at least, since 1962, that the executive committee met in such a fashion, and you testified on direct that this was to share the risks?

A. Yes, we felt that we were taking a chance with this kind of a statute, or position, and that there was a lot of money involved. And I think it is perfectly normal—it's kind of like if I have an idea and I feel like it might not work, I would kind of like to go to my superior and at least tell him and get his support. And if it doesn't work, then we are both in trouble.

Q. On the next page of this, and as you pointed out, and correctly so, that the remainder of the report was either you or Mr. Gimlin speaking. It is noted, and I quote:

> In answer to inquiries from several members of the Committee, it was stated that this pricing policy might, or might not, be followed by competitors, and if followed, would probably be subject to variations announced by one or more competitors, but that it was believed that the principal competitors in the industry were also experiencing continually lower margins of profit and would welcome an opportunity to receive better and fairer margins of profit.

[12,971] Were you able to make that statement, or was Mr. Gimlin able to make that statement in part by reason of the fact that at the October, Ponte Vedra, meeting you heard a lot of rumblings about lower earnings among your competitors?

A. Not necessarily. I think we could have made that statement if I never had been near Ponte Vedra. We knew what our costs were, and we knew how we were integrated. There were published quarterly statements from our competitors. We knew that our competitors in many cases had higher costs, and that if we were showing blood, it wasn't difficult through some eyes to see that they were too.

Q. All right, sir.

Thereafter, on November 10, 1965, in Greenville, Mississippi, the Board of Directors met, and as was pointed out earlier, Mr. Morgan reported the new program which had been agreed upon and approved by the Executive Committee, correct?

A. Well, I wasn't in the entire board meeting, and it is normal for the board to approve Executive Committee minutes. So that is probably what they would have done. I don't recall any extensive discussion at the Board meeting on the matter. The board meeting concerned itself at that time more with the reorganization.

Q. Now, after Greenville, Mississippi—not after, [12,972] but upon the conclusion of that board meeting, you went to New York City, didn't you?

A. Yes, sir, I did.

Q. And then from New York City you didn't go to Chicago, but you went down to Tampa, Florida, didn't you?

A. Yes, that is correct.

Q. Now, New York City is the headquarters of Flintkote Company, is it not?

A. I think their headquarters were in New Jersey, but we are talking about the New York area. That is correct.

Q. And Tampa is the headquarters of Celotex Corporation, is it not?

A. Yes, sir, it is.

Q. And you sent a letter to the Association in December of 1965 indicating that prior thereto you had met with Mr. Moran of Flintkote and Mr. Jim Walter, the President of Celotex Corporation, did you not?

A. No, I think we are mixing two things up. The original plan was to go to Tampa from Greenville to see Mr. Walter. He couldn't see me that next day, and so I rearranged my trip because I had planned to go visit our people in New York. So I just reversed it. It would have been easier if I would have gone from Greenville to Tampa to New York.

[12,973] Now, my reason for my visit to Tampa was to see Mr. Walter to get him to intercede on holding up the potential cancellation of the wool contract with Celotex until we could finish out our research and see if we could give him the product they wanted.

I then went to New York, and there I handled business of a company nature with Mr. Norris, and I can go into the details of that if you like, but that is it.

Q. Did you see Mr. Moran in New York and Mr. Walter in Tampa, Florida, the chief executive officers of each of these two corporations, and advise them the fact that you intended on November 17, 1965, to issue a new price announcement?

A. I did not.

Q. Did you see Mr. Pecaro when you were in New York?

A. No, I did not.

Q. Well, when did you talk to Mr. Walter about the special marketing task force problems that your letter to the Association indicated?

A. That was why I wanted to separate the two parts. There were four people that I reported to Mr. Abnee or Mr. Yeager that I had some discussion with about the task force and how it should be set up. I don't recall that I met with them. I believe they were all telephone conversations.

[12,974] Q. And this was prior to the time of your announcement of November 17, 1965, was it not?

A. No. I can't place the time. I know that was some time between the end of November and the middle of December. Abnee and Yeager kind of jagged me on what was I doing about the task force, so that sometime in that period I wrote them a letter. I don't recall the date of the letter, but I told them, "Here are my ideas. And I have come to the conclusion that this cannot be a small group. It should involve the whole board." And I had discussed some of my own ideas with at least three or four people.

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[12,976] Q. Why is it that you included in your letter to your competitors announcing the job price protection list and its availability at Arthur Anderson an internal document, an internal policy document of United States Gypsum?

A. Well, there was—as I said, the idea of stating what our policy was publicly and openly was approved by our legal counsel. We had the question of whether we would simply incorporate all those facts in a letter, which would have made

it longer, or use my cover letter and just attach the policy, so that was why we did it.

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[12,987] • • •

[Jury recessed.]

The COURT. All right. Now, that terminates any inquiry as to anything prior to—what is it? December——

Mr. FRICANO. 27, I believe, 1968.

The COURT. December 27, 1968.

There will be no further question concerning any period prior to that date.

Mr. FRICANO. I understand the Court's ruling, and I will certainly—as I always do——

The COURT. Well, that's my ruling.

Mr. FRICANO. I understand it. But, may I make one statement, sir?

The COURT. You may.

Mr. FRICANO. Thank you, Your Honor.

Now, I could be dead wrong on this—and I have been dead wrong on a lot of things in my life——

The COURT. I have been, too, and I [12,988] could be, but that's my ruling.

Mr. FRICANO. I know it is your ruling, but I want to make a brief statement, if I might.

The COURT. Go ahead.

Mr. FRICANO. My understanding of conspiracies, and the rule of law of conspiracy is that once the conspiracy is shown to have begun, once the defendants are shown to have conspired by the requisite requirement of evidence, that that conspiracy is assumed to continue as a matter of law until evidence of abandonment—which must be brought forward—has been established.

The evidence of abandonment, as I understand it, as I read the cases, points to two requisites.

One, the notification by the conspirator to all his other co-conspirators that he is abandoning the conspiracy; and/or a confession to law enforcement officers.

The COURT. All right, Mr. Fricano, you have made your statement.

Now I am going to make mine.

I am slowly gaining the impression that by the massive questioning concerning pre-statutory period, the just absolutely massive and gross detail questioning, we are approaching the point where you are going to deprive these defendants of a fair trial.

If you persist in that, I am going to dismiss this [12,989] indictment.

Now, that's my impression, so let's not have any misunderstanding about it. By the very broad and massive questioning as to '61, '62, '63, '64, and nothing within the statutory period, I am gaining the impression that we are risking, we are approaching the point of risking that.

So, you be advised now as to my statement.

We will recess for ten minutes.

[Recess taken.]

[12,990] The COURT. Proceed.

By Mr. FRICANO:

Q. Now, with respect to the period of 1969 through 1973, did you from time to time over the telephone and face-to-face talk to competitors with whom you were checking prices prior to that time?

A. Between those periods I had conversations with competitors; that is correct. I went to meetings, and I called them on some things; that is correct.

Q. All right, sir.

Now, yesterday you testified at page 12,876 of the transcript as follows:

And this is on cross-examination by me.

> Question. Did not the general credit manager and those within his department—if that is the right terminology—also engage in checking out competitive situations with respect to extened terms?
>
> Answer. Not to my knowledge. They did check, I think, credit. You know, the credit standing of a customer. But not to my knowledge did they check the terms and conditions of sale.

On February 13, 1969, in Government Exhibit No. 23, this memorandum to you concerning the decision in the Supreme Court of the United States, the Container [12,991] Corporation; you directed this memorandum to a number of different

people among whom were Mr. Croak, the cerdit manager of United States Gypsum at that time, Mr. Hogan, the treasurer and former general credit manager of U.S. Gypsum at that time.

How do you account for your testimony, sir, that they weren't checking on extended terms, yet you directed this memorandum to them?

A. Well, I wanted anybody that had any contact with competitors to know what our postion was.

Now, to my knowledge all the verification on credit terms was done by marketing people because it was a marketing problem with competition.

The question was whether we would send two or three letters, or whether I just would send one. And I wanted everybody to know what the marketing policy people and what all divisions were to do. And that was they were not to verify.

Q. There is evidence in this record in the form of contemporaneous documents, Government Exhibit 1009, dated February 10, 1971, that on or about that date Celotex Corporation, a Mr. Reth, phoned United States Gypsum and learned that the terms with respect to a particular customer were not competitive.

How do you account for that, sir?

[12,992] A. Well, I have no knowledge of it, so I can't account for it.

Mr. FRICANO. No further cross.

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[12,994] • • •

JAY P. NICELY, called as a witness by and on his own behalf, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. WARNKE:

Q. Where do you live, Mr. Nicely?

A. East Aurora, New York.

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[12,996] • • •

By Mr. WARNKE:

Q. And have you been in Buffalo since 1960?

[12,997] A. Yes.

Q. And what jobs have you held during that period of time?

A. Well, I held the general sales manager's job, and that was general sales manager of dealer sales, and it didn't include special sales, and it only included the 37 eastern states, with just a little of Colorado. I held that job off and on until January or March of 1964. I say off and on because I split my responsibilities with a Mr. Harless. He took the eastern half of what was dealer sales east and I took the western half.

And in March of 1964, I was made a vice president of the corporation.

Q. Was that in charge of sales or——

A. That was in charge of sales. It was to replace Mr. Hilding who had been killed in a fire, and I stayed—this was in charge of sales east, which still was only the 37 eastern states. And it was dealer sales. It didn't include paint sales, commercial trade sales, industrial sales.

Q. When you say dealer sales, would that be sales of gypsum wallboard to dealers?

A. Yes, that was. All of our sales that I had charge of were primarily to dealers.

Q. All right. And then were there any changes since [12,998] that time? You say you became a corporate vice president for sales in 1964. Have you held that job since then?

A. I haven't held the corporate job of a vice president because we became divisionalized somewhere in '65 or '66, and at that time I was appointed vice president of the Building Products Division.

Q. Did that include gypsum wallboard sales, Mr. Nicely?

A. Yes, and at that time I did not stand for the re-election of vice president of the corporation.

I might say that in April of 1965 I was given the entire responsibility of sales for the Building Products Division.

[12,999] By Mr. WARNKE:

Q. That is entire responsibility in terms of geographical coverage, is that correct?

A. In terms of geographical coverage and also in terms of all products of the Building Products Division.

Q. I see.

Would there have been any changes subsequent to that time or have you continued in that same capacity?

A. I continued——
Q. Up to December 27, 1973.
A. I have continued in that capacity.
Q. At any time since December 27, 1968, have you been a corporate Vice-President?
A. No.
Q. You have been a divisional officer, is that correct?
A. That is correct.
Q. In connection with your activities, have you had reporting to you a Mr. Ken Atwell, who testified earlier in this case?
A. Yes, I have.
Q. What was his job?
A. He was Director of Sales Administration up until, I think some time in 1968, and then he was made a Division Vice-President and he has held that job, I guess, continuously since I have—since he reported to me.
[13,000] Q. Now in that connection, have you supervised Mr. Atwell's day-today activity?
A. I couldn't say day-to-day activity. I have—he certainly has reported to me, but on a day-to-day basis, I would say that he is pretty much on his own.
In 1965 when Mr. Colon Brown became Chairman, one of the things he told us, that he was going to delegate authority and he would expect us to do the same.
So, Mr. Atwell is pretty much, has been pretty much his own boss. Plus the fact from the time I went to Buffalo in 1960, even through mid last year, I would say that I have spent probably 60 percent of my time travelling.
Q. In connection with these travels, Mr. Nicely, has that travelling been in connection with sales activity?
A. Yes, sir.
Q. In your career with National Gypsum Company, have you always been engaged in sales?
A. With the exception of two short periods.
One was a three-month period in 1949 I was—probably could have been called staff, except I was still traveling. I suppose you could say I have always been in sales with the company, direct line.
Q. In that connection, prior to 1965, when I think you testified you had become a Vice-President of Sales for the Eastern states, prior to that time, did you have any [13,001] authority over prices?

A. No, none whatsoever.
Q. After that time, would you describe what authority you had over prices?
A. Well, I guess I had more of a consultant nature authority on price.
The year 1965, I guess through '66 and '67 we had a price policy committee. I believe that was made up of Mr. Atwell, Mr. William Duncan, Mr. John Hayes and myself.
Q. And what were the functions of that committee?
A. Well, we met and discussed prices in general. I guess you—prices in general, should there be a price increase, how is our price versus cost, just general.
Q. Did this committee have to do with meeting competitive discounts or did it have to do with changes in list prices?
A. No, changes in list price.
Q. Right.
You say that was during '65 to '67. At that time did the committee cease functioning, or did it continue to function?
A. It just sort of dissolved.
Q. Why was that, Mr. Nicely?
A. At that time there was a new position created which was Vice-President of Merchandising Operations.
[13,002] Q. Who had that job?
A. Mr. John Hayes.
Q. He became Vice-President for Merchandise Operations in January, 1968?
A. January, 1968.
Q. That is the Mr. Hayes who testified a couple of weeks ago?
A. Yes, it is.
Q. In that capacity, did you report to Mr. Hayes? Was he your superior?
A. Yes, yes, I did.
Q. Who had pricing authority beginning with January 1, 1968, when Mr. Hayes became Vice-President for Merchandising Operations?
A. From my standpoint, Mr. Hayes had pricing authority.
Q. Did you consult with him about prices?
A. Yes, I did.
Q. You had no direct authority over prices yourself?
A. No, I didn't.

Q. How would you describe the difference, if any, between the functions of sales and the function of pricing policy?

A. Well, I think that when Mr. Atwell reported to me in 19 and 65, until his present—to the present time, which he reports now to the President of the Division——

[13,003] Q. We are concerned only with the period up until December 27——

A. 1973.

Q. ——1973, Mr. Nicely.

A. Okay.

Theoretically sales should never have, in my opinion, sales, as we are constituted, in my opinion should not have authority over pricing policy. It puts the Sales Department in a position where they might exercise more authority on price and the downward trend to sell merchandise than they should.

Q. They tend to lower prices in order to increase volume, is that correct?

A. It could be said if you had the wrong person as head of sales, and the pressure was on him to create sales, he could exercise authority that should not be exercised.

Q. All right.

How about the pricing responsibility? How has that been exercised during your service with National Gypsum?

A. Are you speaking of day-to-day prices?

Q. Yes, in terms of deciding whether or not to increase list prices, has that been exercised by the sales people, or has it been exercised by some other office?

[13,004] A. Well, it has been exercised, I would say, in most part by other offices.

In my consultations with Mr. Hayes and prior to Mr. Hayes with the pricing committee, we would make recommendations and I suppose the final authority would at that time, would rest with the Chairman. I think he has accepted our recommendations in most cases.

Q. In your function in connection with sales, have you concerned yourself directly with costs?

A. No.

Q. And the others who have been involved with principally the pricing function, have they involved themselves with costs?

A. Oh, yes.

Q. And that has been part of the input in their decision-making process?

A. Oh, yes.

Q. You have testified, Mr. Nicely, that in the period of time from—well, really from your beginning of service with National Gypsum in sales until December 27, 1973, that you spent around 60 percent of your time in the field, is that correct?

A. That is correct.

Q. When you went into the field, what did you do?

A. Well, I called on customers. That was my primary [13,005] reason for going to the field. I suppose the secondary reason was to evaluate the sales personnel, to look at the salesmen, to look at the managers, to look at our facilities, to determine whether or not we had ample facilities, whether we had enough salesmen or whether we had too many salesmen.

But my primary function was really to get an order.

Q. In that connection, you say you called on customers?

A. Yes.

Q. Would these be dealers that you called on?

A. Well, I called on dealers primarily, but I also called on contractors and I called on architects and I called on any factor that would have to do with the material, buying material from us. It could be a builder.

Q. And did you limit your calls on dealers to the large dealers or did you try to cover some sort of spectrum?

A. No, I suppose I called on as many small dealers as I did large dealers.

The fact is, the nature of our company and its growth has been through small dealers. It has been my philosophy over the past years I would much rather have $100,000 from ten dealers than to have $100,000 from one dealer. I would spread my base and if I lost one account, I didn't lose too much business.

And the other thing, I guess, Mr. Warnke, was [13,006] when I went into a district I expected the district manager to have a schedule ready for me to work. I didn't normally go to the office when I got off an airplane. I was picked up and I started working.

Q. When you say you started working, you started making dealers sales calls?

A. Yes, I did.

Q. And did you do this when you were dealer sales manager?

A. Yes, I did.

Q. How about when you became Central Division Sales Manager?

A. I did the same.

Q. And as General Sales Manager you also made personal calls on dealers?

A. Yes, I did.

Q. How about when you became Director of Sales back in 1964?

A. There was no change.

Q. When you became Vice-President of Sales?

A. Same thing.

Q. You continued to call on dealers?

A. Yes, I did.

Q. And you continued to call on both large and small dealers?

[13,007] A. Yes.

Q. And now, in addition to your activities in direct sales in the field, you mentioned that you evaluated the sales personnel.

Have you had any sort of function in connection with restructuring the sales organization or making any sort of change, or has that been handled by someone else?

A. No, I think when you have the responsibility for a sales force the size of ours—we had somewhere around 500 salesmen when I was made Vice-President and took charge of the entire sales division.

Q. That was in 1964, '65?

A. '64 I was made Vice-President, but '65 I took charge of the entire Division.

Q. I see.

A. At that time, I recall that we had—we had 67 assistant district managers. We had 50 district managers. We had 12 division managers. I don't believe at that time we had regional managers. And all in all, we had under my direct and indirect supervision in the sales department, including the office personnel, we had about 1,000 people.

Now, when I got to looking at the managerial staff, I got down to the point where we had one manager for about every 3½ to 4 people and I thought that was pretty heavy managerial load to carry.

[13,008] By Mr. WARNKE:

Q. Does this remind you of your army service?

A. I think, in the army, we had around one to four.

Q. And what did you do when you found this sort of structure existing in your sales organization?

A. I started a process of consolidation. I consolidated district offices, recalled the—discontinued the Albuquerque district office, the Oklahoma City district office, discontinued the Peoria, Illinois, office, discontinued the Columbus, Ohio, office, the Albany, New York, office, and consolidated those into other offices.

Q. And did this consolidation activity take place at the time period between December 27, 1968, and December 27, 1973?

A. No. Some of it took——

Q. I mean, did it continue during that period of time?

A. Oh, yes, yes.

Q. And you were occupied in this sort of restructuring activity during that—those years?

A. Yes, and I think probably, outside of the time I spent in the field, that most of my time was spent on organizational structure.

Q. All right. Now, you have testified, Mr. Nicely, that you made sales calls in various parts of the country. How did you determine what sales districts to go into?

[13,009] A. Well, until April, 1965, I had very little choice on that. The people over me directed me where to go. After '65, I made my own decision, but my own decision and theirs were about the same. I went into districts which were below quota, which were not selling——

Q. What does "below quota" mean, Mr. Nicely?

A. Well, in our company, we set a budget which—say we are going to sell $300,000,000 in 1975, and then we assign that dollar—those dollars in districts, and we break it down further into products, out of the $300,000,000 we want to sell $150,000,000 in wallboard, and, of that wallboard, we want to sell half of that, maybe, in half-inch board. We will break it all down into products, and then, when we—when I look at a sales report, it is very simple for me to see that, if the Boston, Massachusetts, is at 85 percent of quota, that there is something wrong. Now, it may be that I know what is wrong. At that point, it may be that I have enough records showing some outside factors which the district could not do anything about, so I doubt seriously if I would go to Boston if I knew that,

but, if I see a district—taking an example, '72 or 3—let's take Tampa, Florida.

* * * * *

Q.
[13.010] * * *

How did you happen to go to Dallas, back in March of 1962?

A. Well, Dallas had two problems in 1962, and I suppose they had problems in '60 and '61. I think it had a continued problem.

They had two problems. They had what I thought was managerial problems, and they also had sales problems. They were well under quota, and those—that could have been a result of poor management, or it could have been the result of outside factors. Nevertheless, I spent considerable time in Dallas in '62. I think I recall expense reports, which I [13.011] did check just recently, and I think I spent—made five or six trips to Dallas in 1962.

Q. And, at that time, Mr. Nicely, you were general sales manager for dealer sales, according to the stipulation. Is that correct?

A. That is correct.

Q. Now, in that connection, what was your area of authority, geographically? Did it extend—it must have extended to Dallas; is that correct?

A. Yes. It extended to Dallas, and, in Texas, it extended westward to—I guess to San Antonio. I didn't have El Paso. I didn't have that entire corner of Texas, which is your—as you recall, there is a little corner that juts out.

Q. And who had authority over that part of Texas?

A. That was the west coast.

Q. And that would have been some other official of the National Gypsum Company; is that correct?

A. Well, that would have been Mr. Gustavus.

Q. Yes.

A. We had that broken—incidentally, we had it broken down into what we called the regions. Mr. Gustavus was, at one time, vice president of the western region.

Q. When you went to Dallas in March of 1962, were you told who to call on, when you went to Dallas?

[13.012] A. Yes. I had a schedule.

Q. Well, who made up that schedule?

A. Mr. Phillips.

Q. And who was Mr. Phillips?

A. Mr. Phillips was district manager at Dallas.

Q. Did anybody in Buffalo tell you who to call upon or what problems you were going to encounter?

A. No.

Q. Did any of them give you any sort of messages to carry to anybody in Dallas?

A. No, sir; and I might say, if they had of given me messages, it would have been the type I probably shouldn't have carried.

Q. Would you say that this was a sales call that was typical of others that you were making at that time, or was there something special about this sales call to Dallas in 1962?

A. Oh, the trip to Dallas was no different than many trips I made to troubled districts. Primarily, I am thinking, at that time, I spent a lot of time in New Orleans; I had problems there. I had problems in Denver. Those are just three districts I seemed to live in, there, for a year or two. I spent, sometimes, two weeks on a long trip—I didn't come home on the weekend, so I would spend a weekend at some of those districts.

[13.013] Q. This particular sales trip, do you remember when you got to Dallas?

A. Well, I got in there some time Monday.

Q. And then what did you do, after that?

A. Well, I immediately started calling on customers.

Q. And these were pursuant, you say, to a schedule arranged by Mr. Phillips, the district sales manager?

A. Yes.

Q. Do you remember a call on Groves Lumber Company?

A. Yes, I do.

Q. And did that take place on Monday?

A. No, it didn't.

Q. Or Tuesday or Wednesday?

A. No, sir, it didn't.

Q. What day did it take place?

A. It took place on Thursday.

Q. Now, was Groves Lumber Company the only call you made on Thursday, or was it one of a group of calls?

A. Groves was just a routine call. I recall that, at that time, we had a—we had a salesman by the name of Mr. McPherson,

and I guess the reason I remember Mr. McPherson is I had looked at Mr. McPherson with the thought of promoting him to an assistant district manager, but, prior to my going to Dallas, Mr. McPherson resigned to take another job, take a job with one of our dealers, so I spent most of [13,014] my time, or at least that Thursday and probably Friday, calling on Mr. McPherson's accounts, in the presence of or with our assistant district manager.

Q. And was Groves Lumber Company one of Mr. McPherson's accounts?

A. Yes, it was.

Q. Now, prior to going to Dallas and prior to calling on Groves Lumber Company, had you discussed with any of your competitors anything to do with the competition of the Texas Gypsum Company?

A. No, I hadn't.

Q. Had you encountered any competition from the Texas Gypsum Company prior to going to Texas in March of 1962?

A. No, I hadn't.

Q. To the best of your knowledge, was Texas Gypsum Company delivering into Dallas, prior to anything that you learned when you made this trip in March of 1962?

A. I think probably the first time I got involved with Texas Gypsum Company, our competitive situation would have been at Groves Lumber Company.

Q. And had you known, before this Dallas trip, that Texas Gypsum Company was selling to Groves Lumber Company?

A. No, I didn't.

Q. Now, you said you had no responsiblity for the [13,015] El Paso area at that time; is that correct?

A. That's right.

Q And Texas Gypsum Company, I take it, was located in El Paso at that time, to the best of your knowledge?

A. Well, to the best of my knowledge, it was. I had heard very little of Texas Gypsum Company. I suppose, outside of reading in the paper that someone had sent me, that they couldn't have existed, as far as my territory was concerned, and that they—and I think you heard the testimony hear that their primary marketing area was in the El Paso area, the Albuquerque, New Mexico area, of which I had no control over whatsoever.

Q. I see. Now, you say you went to Dallas because of sales problems and because of management problems. What was the purpose of your calling on Groves Lumber Company when you went to Dallas?

A. To get an order.

Q. And did you ask for an order?

A. Yes, I did.

Q. Had you called on a number of other dealers in Texas, or was Groves a unique example of your calling on a dealer?

A. No, I had called on dealers all week.

Q. And was Groves the smallest dealer you had called on [13,016] or the largest or intermediate, or what?

A. I don't think it was the smallest. In fact, the call immediately after that, Groves, was Sherwin-Williams, a little paint store, so I think it would have been smaller than Groves. There are many small dealers in Dallas. There were a dozen small dealers in Dallas.

Q. You seem, Mr. Nicely, to have a very vivid recollection of this call. Did you have any reason to focus on that, what occurred on a ——

A. Since 1962, I haven't had a chance to forget the call. There have been other matters that came up. This has been brought to my attention, but I don't think I would have forgotten Groves Lumber Company call, anyway, because there are certain things you do in the run of the year that you remember. There are certain things you don't remember.

Q. And you——

A. And it——

Q. And you, of course, were present here in court when Mr. Tinsley testified with respect to that call?

A. That is correct. Yes, I was.

Q. And have you had occasion, since then, to refresh your recollection as to what occurred? Have you checked any records?

A. Well, I have read one document. Yes.

[13,017] Mr. WARNKE. Mr. Grainer, might the witness have Defendant Nicely Exhibit 1?

By Mr. WARNKE:

Q. You are familiar with this document which is in evidence, Mr. Nicely; is that correct?

A. Yes, I am.

Q. And that is a sworn statement that was given by you at one time as to what occurred with Groves Lumber Company?

A. Yes, sir.

Q. Does that accurately reflect your recollection of what occurred?

A. Yes, it does.

Q. Pertaining to the substance of the discussion back in March 1962, you say you asked Mr. Tinsley for an order. Was Mr. Tinsley the buyer for Groves Lumber Company?

A. I think Mr. Tinsley was the manager of Groves Lumber Company. As I recall, Groves Lumber Company was owned by—maybe by Mrs. Groves. But, he was the only person I talked to. I preume he was the manager.

Q. And what inducements did you offer to Mr. Tinsley to buy from you, give you an order?

A. Well, I offered the inducement of buying a top-notch product. I certainly didn't give him any price inducement.

[13,018] Q. Did you offer to sell him at any kind of a discount in price?

A. No, I didn't.

Q. Did you offer him any sort of an unloading allowance?

A. No, I didn't.

Q. Did he tell you who he was buying from at that point?

A. Yes. He told me he was buying from Texas Gypsum Company. He had bought some from Texas Gypsum Company?

Q. Did he tell you how delivery was made by Texas Gypsum Company?

A. Yes, he did.

Q. And what means of delivery did he say existed?

A. By truck.

Q. Did he ask you to give him truck delivery?

A. Oh, I don't know that he asked us to give him truck delivery. He asked what our policy was, and I told him what our policy was.

Q. And what was that, Mr. Nicely?

A. Well, at that time in that area our policy was to deliver by rail to the dealer's private siding, or to the nearest team track to the dealer's place of business.

Q. And did you offer to make any kind of a deviation from that policy for Groves Lumber Company?

A. No, I didn't.

[13,019] Q. Now, can you recount what, if anything, Mr. Tinsley said to you about his reasons for not giving you an order?

A. No. I recall a couple of questions he asked me.

Q. What were those, Mr. Nicely?

A. The first thing he hit me with—And I might say Mr. Tinsley was a little belligerent that day. I had done nothing to him. He was a little belligerent. He wanted to know why all the big gypsum companies were jumping on Texas Gypsum Company.

Q. What did you say in response to that question?

A. I said that I had no knowedge of that; but as far as National Gypsum Company was concerned, we were not jumping on Texas Gypsum Company. I said, "In fact, we are not even meeting Texas Gypsum Company here."

And, in meeting, I am speaking of trucking.

Q. And did he challenge that statement?

A. No. Then he got into other companies, and he said, "Well, why is U. S. G. jumping on them?"

And I said, "I have no idea of U. S. G.'s action toward Texas Gypsum Company. But, I suppose that if they are cutting prices and doing what you say, jumping on them, I suppose that they have no intention of letting Texas Gypsum Company or any other company take their business without a fight."

[13,020] Q. Now, had you had any talks with U. S. Gypsum Company, or any other gypsum supplier, with regard to their policies in Texas?

A. No. I had not.

Q. This was just an opinion on your part in response to Mr. Tinsley's question?

A. Purely an opinion.

Q. Now, there was a reference made by Mr. Tinsley in his testimony to a comment that you allegedly made with regard to a policy of containment. Do you remember using those terms, "a policy of containment?"

A. No, I don't recall using those terms. It doesn't sound like my language. But if I'd have used them, it certainly wouldn't have been any containment that I had entered into an agreement with anyone else to contain them.

Q. Did National Gypsum Company have any policy of containment of Texas Gypsum Company in March of 1962 in Dallas?

A. No.

Q. Or anyplace else?

A. No.

Q. Now, he referred—I am speaking of Mr. Tinsley. He referred to comments about what they were doing with respect to meeting Texas Gypsum Company's competition.

How do you refer to a competitor such as the [13,021] United States Gypsum Company? Do you call it "he," "she," or "it?"

A. Well, I think I remember what I just said. If United States Gypsum Company was doing any of these things, that they had no intention of letting anyone take their business, so I think I would refer to them as "they." I think I'd refer to us probably as "we" or "us."

Q. So as far as you are concerned the competition is "they" and you are "we?"

A. That's right.

Q. Prior to this conversation you have testified that you had no knowledge of what U. S. Gypsum Company might be doing in Texas; is that correct?

A. None whatsoever.

Q. And anything you learned about that would have come from Mr. Tinsley?

A. Well, it would have come from Mr. Tinsley or some other dealer I called on. Had they been doing something that I—I recall no other. I recall no other talk about Texas Gypsum Company except from Mr. Tinsley.

Q. Did you encounter Texas Gypsum Company's competition with any of the other dealers that you called on in March of 1962 in Dallas?

A. Not that I recall, no.

Q. Let me turn now, Mr. Nicely, to the question of [13,022] verification of lower competitive prices and credit terms by calls to competitors.

You, of course, have been here throughout the course of this trial, and you have heard a certain amount of testimony with respect to that; is that correct?

A. Yes, it is.

Q. And would you describe for us what connection you had with the practice of verifying lower competitive offers with competitors during the period of time in which the testimony indicates National Gypsum Company authorized some of its employees to enage in those calls? What was your connection with it?

A. Well, I had no direct connection. I never made a call to a competitor. I never received a call from a competitor. I never talked to a competitor about verification of a price. I had no direct connection with verification.

Q. When you became Director of Sales in 1964, and then Vice-President of Sales first for the East in '64, and then country-wide in '65, was the procedure of verification then going on, or did it stop during that period?

A. No. When I became Director of Sales in '60, I had never heard of the term "verification of sales." And I had never heard of verification of sales.

Q. So you heard about it when you first came to Buffalo [13,023] in 1960; is that correct?

A. Well, I wouldn't want to say that I heard about it when I first came to Buffalo.

Q. What would you say then?

A. I don't know when I first heard of it. I know that when I became Vice-President and had the responsibility for Mr. Atwell direct—he was my subordinate—that I knew he was making verification calls.

When he started, or when verification started in our company, I have no idea.

Q. Did you ever give Mr. Atwell or anybody else instructions with regard to verification of prices with competitors?

A. Not to make verification calls I never gave him instructions, no.

Q. Did you give him any instructions with respect to procedures to follow in making verifications?

A. No, I didn't.

Q. Do you know whether at that time, or at subsequent times, there was any sort of a statement, a company policy, with respect to verification?

A. Well, I believe sometime in—and there has been a document shown here—sometime in 1967 Mr. Wagner—who I believe was Vice-President of Administration—wrote a policy on this.

[13,024] Mr. WARNKE. Mr. Grainer, might the witness have Defendant National Gypsum Exhibit 77.

By Mr. WARNKE:

Q. And while they are getting that—I gather, Mr. Nicely, that you are referring to a document on antitrust law compliance?

A. Yes.

Q. Which was issued over the signature of Mr. Wagner in 1967?

A. Yes. 12/1/67.

Q. Right.

And in that connection I refer you to page 8 and ask you that you take a look at the right-hand column and tell me if that's what you mean by the company policy with respect to the verification of prices with competitors?

A. Yes, it is.

Q. And that is the page 8 dated December 1, 1967; is that correct?

A. 12/1/67, yes.

Q. And what that says is that it is not unlawful to check directly with a competitor without comment or discussion of any kind about a past or present fact, what prices, terms, or conditions of sale he has charged or quoted; is that correct?

A. That's correct.

[13,025] Q. And was that your understanding of the policy with respect to verification calls?

A. Yes, it was.

Q. And that was your understanding in 1965 when you first became Vice-President in charge of Sales?

A. Yes, it was.

Q. So this was really a restatement of existing policy as of that time; is that correct?

A. Yes.

Q. And in addition, on page 8 of National Gypsum Exhibit 77, I refer you to the bottom of the page where it says that:

> Such contacts shall be made only by persons authorized by management and who will have direct responsibility to keep such contacts limited and lawful.

Is that correct?

A. That's correct.

Q. And does that reflect your recollection that there was no general authority to people in the field to verify competitive offers with competitors?

A. Yes.

Q. Now, to the best of your knowledge, who had authority to verify lower competitive prices?

A. Well, to the best of my knowledge Mr. Atwell was [13,026] the only person to have that authority.

Q. Did you hear testimony earlier in this case that some of Mr. Atwell's assistants from time to time verified prices with competitors?

A. Yes, I did.

Q. Had you known that prior to this time?

A. No, I hadn't.

Q. Now, also are you familiar with the fact that some people in the credit department checked on credit and credit terms from time to time with competitors?

A. Yes, I understand they did.

Q. And that continued during the period of time after you became Vice-President in charge of Sales in 1965; is that correct?

A. Yes, it did.

Q. And that continued through 1968?

A. I would think so. I have no direct knowledge of it.

Q. And Mr. Atwell, to the best of your knowledge, was authorized to verify lower competitive prices in the years from '65, when you became Vice-President of Sales, until the end of 1968 or early 1969?

A. That's correct.

Q. Now, with respect to this question of verification, you have testified that National Gypsum Exhibit 77 [13,027] accurately reflects your understanding of what the practice was supposed to be; is that true?

A. That's true.

Q. And did that have anything to do with verification of what a competitor might be doing in the future?

A. No. Not whatsoever.

Q. Was it limited strictly to existing offers or past prices?

A. Yes.

Q. Now, when you learned about verification, did you acquire an understanding of why it was that the National Gypsum Company occasionally verified lower competitive prices as reported by customers?

A. Yes, I did.

[13,028] By Mr. WARNKE:

Q. What was your understanding of the reasons for these verification calls?

A. Well, I think there were two basic reasons sort of tied together. One was to assure us of a compliance with the Robin-

son-Patman Act. And the other was to prevent us from discriminating among our customers which might be brought about by, except as a fact, information which we received from our sales department which they had received from customers.

Q. Was it your understanding that this practice of verification and the procedures followed were checked out with legal counsel, or was this done without legal advice?

A. Well, I understand it was checked out with legal counsel.

Q. And was it your understanding that these verification calls occurred normally when you had a report of a lower competitive price from a customer, or were they the exception?

Mr. FRICANO. Objection, Your Honor. Mr. Warnke has asked a series of questions now as to this man's understanding of the practices which he wasn't even engaged in he said.

The COURT. Sustained.

[13,029] By Mr. WARNKE:

Q. With respect to the practice of verification, I would like you to take a look at Government Exhibits 29 and 30–A.

Mr. WARNKE. May the witness have those, Mr. Grainer.

[Exhibits are handed to the witness by Mr. Grainer.]

By Mr. WARNKE:

Q. Do you have those documents, Mr. Nicely?

A. Yes, I have. Each one of these is a separate page.

Q. Do you have the exhibit marked Government Exhibit 29?

A. Yes, I have.

Q. And also the Government Exhibit 30–A?

A. I have it. I haven't looked at it.

Q. Would you take a look at it just to familiarize yourself with it.

A. Yes.

Q. Government Exhibit 29, which has been testified with respect to, has been identified as certain talking notes that were used by Mr. Atwell in October of 1968, and Government Exhibit 30–A indicates that these talking notes were used apparently in a meeting with a Mr. Gerber.

[13,030] Who is Mr. Gerber?

A. Mr. Gerber at that time was vice president of sales East.

Q. And he reported to you?

A. Yes, he did.

Q. And a Mr. Griffin?

A. Mr. Griffin was at that time, and is now, a regional manager out of Atlanta, Georgia.

Q. And Mr. Phillips?

A. Mr. Phillips is the regional manager in Dallas, Texas.

Q. And then there is a Mr. Stewart.

A. Mr. Stewart at that time was regional manager of the Eastern Region. He is now the vice president.

Q. I see.

These were regional managers?

A. Yes, Griffin, Phillips and Stewart were regional managers.

Q. Would Mr. Gerber be apt to have a meeting with Mr. Griffin, Mr. Phillips, and Mr. Stewart?

A. Yes, I think Mr. Gerber at that time, and as now, he has a meeting with his regional managers about once a month.

Q. All right.

Now, with respect to Government Exhibit 29, you [13,031] are familiar with these talking notes of Mr. Atwell; is that correct?

A. I am only familiar with them from seeing them here in this court.

Q. Do you recall of seeing them before?

A. Not prior to coming to Pittsburgh I don't.

Q. Now, you remember that there has been questions and answers with respect to the talking notes, Government Exhibit 29?

A. Yes, I remember.

Q. From your knowledge of the practice of verification as explained to you when you became vice president in charge of sales, does Government Exhibit 29 have anything to do with vertification?

Mr. FRICANO. Objection, Your Honor. The document speaks for itself.

Mr. WARNKE. I think, Your Honor, that the document apparently speaks in different tones to different counsel, and I would like to have this witness's interpretation of the Government Exhibit 29 based on his knowledge of what was occurring in the sales department at the time that he was vice president in charge of sales.

Mr. FRICANO. If Your Honor please, the witness has testified that he never has seen these before he came to Pittsburgh. Now he is asking for an [13,032] interpretation of them.

Mr. WARNKE. I think, Your Honor, there are a lot of documents as to which there has been testimony by witnesses who have not seen the documents before. I think the witness is qualified to give his view as to whether this document has anything to do with verification.

The COURT. Are these documents in evidence concerning Mr. Nicely?

Mr. FRICANO. Do they concern him, sir?

The COURT. Yes, are they offered for the purpose—were they put here for the purpose of effecting in any way the charges against Mr. Nicely?

Mr. FRICANO. Yes, Your Honor.

The COURT. You may answer the question.

The WITNESS. No, I don't believe they concern any verification whatsoever.

By Mr. WARNKE:

Q. Taking a look at Government Exhibit 30–A, it's addressed to you, of course, and to Mr. Gerber, Mr. Griffin, Mr. Phillips and Mr. Stewart.

Now, you have testified that you made no verification calls at any time; is that correct?

A. That is correct.

[13,033] Q. To the best of your knowledge did Mr. Gerber ever make any verification calls?

A. Well, he certainly had no authority to make them, and I never heard of him making one. I don't think he would go beyond his authority.

Q. And the same thing, of course, would apply as far as receipts of verification calls is concerned; is that true?

A. That is true.

Q. And Mr. Griffin, Mr. Phillips and Mr. Stewart, were they authorized to verify lower competitive prices with competitors?

A. No, they were not.

Q. Were they authorized to receive and respond to such calls from competitors?

A. No, they were not.

Q. Now, again referring to Government Exhibit 30–A, it states:

> After re-reading the legal advice I gave you, I would like to clarify one statement which I think is ambiguous.

This is a memorandum signed by Mr. Atwell, and I take it that it refers to Government Exhibit 29; is that your understanding?

A. That is my understanding.

[13,034] Q. Was Mr. Atwell a lawyer?

A. No, he wasn't. He spent a lot of time with lawyers, but he wasn't a lawyer.

Q. I see.

Now, continuing with his memorandum. He says:

> First of all, I made the statement that "to my knowledge, no one of you have had approval of Buffalo" to contact competitors' employees, and that if you "choose to continue this practice", of occasionally talking to competitors' employees, certain precautions should be taken.

Does that, as you interpret it, confirm the fact that these addressees had no authority to contact competitors?

A. It does to me.

Q. He continues:

> This definitely should not be interpreted as approval to discuss anything with any competitor's employee.
>
> The letter should have read that if you receive a phone call or unexpectedly meet a competitor's employee who talks to you and, if you choose to talk to them, rather than hang up the phone, or walk away from them, the precautions in my letter should apply.

Is that consistent with your understanding that [13,035] Mr. Gerber, Mr. Griffin, Mr. Phillips and Mr. Stewart were totally unrelated to any sort of verification calls?

A. Yes, it is.

Q. Now, you have testified that you have not to your recollection seen Government Exhibit 29 prior to coming into this court; is that correct?

A. That is my testimony, yes.

Q. Government Exhibit 30–A has you as one of the addressees. Do you recall seeing that before coming into court?

A. I don't recall seeing that.

[13,036] By Mr. WARNKE:

Q. Did you, Mr. Nicely, as vice president in charge of sales, routinely see all documents as to which you were the addressee?

A. No, Mr. Warnke, I didn't. And if I had, I would have been covered up with paper.

Q. How did you handle this correspondence addressed to you, memoranda, etc.?

A. Since I traveled extensively, I would say 60 percent of the time, 35 weeks out of the year or more, I had an administrative assistant, had him since I was vice president. I still have one, and routine correspondence—and I speak of routine correspondence as correspondence that doesn't require any action by me—is handled by my administrative assistant.

So when I come back after a trip, I don't have a volume of carbon copies and other matter which could be handled by someone else. And, besides, if I am gone two weeks and it is put in my desk, well, we could—a lot could happen in two weeks. So it is handled by my assistant.

Q. Then, with regard to the question of verification, you say Mr. Atwell reported to you: is that correct?

A. Yes, he did.

Q. And did you ever advise Mr. Atwell not to keep notes of verification calls?

[13,037] A. No, I didn't.

Q. Did you ever hear of anybody advising Mr. Atwell not to keep notes of verification calls?

A. No, I never heard that.

Q. Is it your understanding that the practice of verification calls was publicly known as far as National Gypsum Company is concerned, within the National Gypsum Company?

A. I don't know how extensively it was known within National Gypsum Company.

Q. I mean after 1967, when the Defendant National Gypsum Exhibit 77 was circulated, which had the page 8 to which we referred.

A. Oh, I would think after that time, yes, it was well known.

Q. Do you remember whether you were in attendance at the meeting which apparently took place on October 25, 1968, at which Mr. Atwell made these comments to the regional managers?

A. I could have been. It is rather doubtful if I would have been there. I don't normally make a practice of attending Mr. Gerber's meetings with his regional managers. I stay away for one reason. Mr. Gerber had the responsibility for those managers, and I don't want to usurp his authority, and I might get involved with something that he didn't want [13,038] to bring up to them, so I stay out his meetings, unless I am invited by him.

Q. But you have no recollection of being in attendance when Mr. Atwell made these comments?

A. No, I haven't.

Q. Referring to the last page of Government Exhibit 29, which are the notes used by Atwell, there is a reference to Mr. Gustavus, and to the fact that Mr. Gustavus was given the type of authority now being given to you.

Do you know what the type of authority was that was given to Mr. Gustavus?

Mr. FRICANO. Objection, Your Honor. The man said he wasn't at the meeting that Mr. Atwell gave these notes at, and he has never seen the document before. Now, he is being asked about an individual who is identified here, a Mr. Gustavus, and what the situation was.

Mr. WARNKE. I believe, Your Honor, I have asked whether he knows what authority was given to Mr. Gustavus, which would have been referred to in these talking papers.

The COURT. If he knows of his own knowledge, he can answer.

Mr. WARNKE. Might the witness see NG 385?

The COURT. He has not answered yet.

[13,039] Mr. WARNKE. I would like to have him see that.

The COURT. Oh.

By Mr. WARNKE:

Q. Mr. Nicely, Defendant National Gypsum Exhibit 385, which is in evidence, is a memorandum to you from Mr. Atwell, dated March 19, 1968. What it says is that "This is just to reduce to writing the authority you and I gave Mr. Gustavus on gypsum during our last trip to the west coast on February 28th," and it goes on to describe authority, as I understand it, given to Mr. Gustavus, to meet certain competition.

Is that correct?

A. Yes, that is what it is.

Q. And does this authority include any sort of authority to verify prices with competitors?

A. No, it doesn't.

Q. Is it your understanding that this is the authority that was given to Mr. Gustavus in 1968, to which Mr. Atwell's notes would have referred?

A. Yes, it is.

Q. Did the time come, Mr. Nicely, at which the verification of competitive prices with competitors was stopped by the National Gypsum Company?

A. Yes, the time came that we stopped it.

Q. When was that time, Mr. Nicely, to the best of your [13,040] knowledge?

A. That was in mid-January of 1969.

[13,041] By Mr. WARNKE:

Q. And did you have anything to do, any role to play in the stopping of this verification practice?

A. Yes, I—on January 21, 1969, I called Mr. Atwell from Denver, Colorado. I was in Denver, Colorado on a sales trip and I told Mr. Atwell that I had read of the Container decision, and I suggested that he cease verification calls. I don't recall whether I found out then or later that he had already had that same advice from counsel.

Q. All right.

Now you say that you read of some case in a newspaper and then called Mr. Atwell, is that correct?

A. I read of the decision in the Container case, yes, the Supreme Court decision in the Container case.

Q. Do you know whether calls to competitors had been made to verify prices in January, 1969?

A. I don't know.

Q. Do you know if any were made after December 27, of 1968?

A. I don't know.

Q. Was it your understanding that the Container case necessarily made the verification calls of National Gypsum Company illegal?

A. No, but—what I read gave me enough concern [13,042] that I thought that I should suggest that we cease verification.

Mr. WARNKE. Mr. Grainer, might the witness have Government Exhibit 25.

By Mr. WARNKE:

Q. While he is getting that, I will describe it to you, Mr. Nicely. That is a memorandum which has been admitted into evidence, and as to which there has been testimony. It is a letter dated December 12, 1969, from Mr. Atwell to Mr.

Hayes and to you, in which Mr. Atwell states that he believes he advised you of the action taken by you earlier this year to stop price verification calls in the Building Products Division of our company, is that correct?

A. Yes, that is correct.

Q. Is this consistent with your recollection that you have been advised by Mr. Atwell that he had stopped price verification calls?

A. Yes, it is consistent.

Q. Do you know why he wrote this letter December 12, 1969?

A. No, I don't know.

Q. But it is your recollection that this letter accurately reflects the fact that the practice had stopped early in 1969?

[13,043] A. Yes, it does.

• • • • •

[13,048] Q. Mr. Nicely, I am told by some of my colleagues I may have misspoken with regard to one question taking you back to March of 1962. And that's with regard to the question as to whether or not prior to going to Dallas you had any knowledge as to what United States Gypsum Company was doing in order to meet the competition of Texas Gypsum Company.

I think I may have said just "Texas." Did you understand my question to relate to U.S.G.'s activities with respect to Texas Gypsum Company?

A. Yes.

Q. And your answer was that you had no information prior to going to Dallas?

A. That's right, I had no information.

Q. Thank you.

Finally, with respect to verification.

You testified, as I understand it, that you only knew of Ken Atwell making verification calls to competitors to check on lower competitive prices; is that correct?

A. That's correct.

[13,049] Q. And were you here at the time that Mr. Kroth testified?

A. Yes, I was.

Q. Had you known prior to that that Mr. Kroth had done any verifying?

A. No, I had not.

Q. And were you here when he testified that you had asked him to make verification calls?

A. Yes, I was.

Q. And was that, as far as you are concerned, a mistake on his part; or how would you characterize it?

A. I think it was a mistake. I think he must have mixed it up with something else, because I have no recollection of ever asking Mr. Kroth or Mr. Webster, or Mr. Atwell or anyone else, to make a verification call for me. It is highly inconceivable that I would have needed anyone to have made one for me, because I can't think of anyone who would have called me. And I am thinking of our people asking me to verify something with a competitor.

Q. Prior to going on one of your field trips, Mr. Nicely, did you ever ask someone in Mr. Atwell's office what the competitive situation was in the district to which you were going?

A. Oh, I think I have done that. That's almost normal procedure as you start out on a trip. You might [13,050] pass by and say, "I am going to Dallas." Or, "I am going to Boston. Is there anything I should know about the market?"

And that's just normal procedure.

Q. But you did not ask if they verify with any competitor?

A. No, I did not.

Q. With respect to your contacts with competitors, Mr. Nicely, would you indicate what circumstances there might have been in which you might have found yourself in the company of competitors?

A. Well, at National Home Builders, at the Retail Lumber Dealers.

Q. Would these be customers' trade shows or conventions, or meetings of some sort?

A. Yes, they would be.

Q. And at those occasions, did you have conversations with your competitors about prices of gypsum wallboard?

A. No, I didn't.

Q. What other occasions would you have had to meet competitors?

A. Well, other trade shows, other than the two I mentioned. The plasterers meetings, and the drywall meetings. I know of no others. And I think the total sum of my conversation with any competitors at those meetings [13,051] would have been confined to, "Hello." And, "How are you?" and, "Nice to see you." and just a general greeting.

Q. Did you have anything to do with intra-industry sales? Did you have anything to do, for example, with the sale of paper to the competitors, the purchase of products from competitors?

A. Yes, I had that responsibility, and I still have that.

Q. And with what competitors would you have had some degree of contact in connection with intra-industry sales?

A. Well, specifically I made one call on American Gypsum. I made a call—had a meeting with Mr. Dierks on one occasion. And, I guess, one call on Grand Rapids. But that was just last year, so actually two calls only in the time we are talking about.

Q. Did you make any sales to United States Gypsum, or did you buy any products from United States Gypsum? When I say "you," I mean "National Gypsum."

A. Yes. We bought some products of United States Gypsum Company. We bought for quite a time Imperial Stucco. And I think we bought some spark tape. And we might have bought the Gypsum board at one time, certain cases.

Q. In the course of any meeting that you might have had with a competitor or competitor's employee with respect [13,052] to the purchase of products or the sale of products, did you discuss with any of them at any time the prices of Gypsum wallboard?

A. No, I did not.

Q. Did you ever attend a meeting of the Gypsum Association, Mr. Nicely?

A. Not—I wouldn't call it a meeting. I attended a social function in either 1954 or '55. I was invited to dinner.

Q. Well, I don't think we are interested in anything that goes back to 1954 and 1955.

A. That's my total involvement in the Gypsum Association.

Q. I see.

And that was a dinner?

A. Yes.

Q. You never attended a Gypsum Association committee meeting?

A. No, sir.

Q. Did you ever receive any reports on the Gypsum Association meetings?

A. No, sir.

Q. On any occasion, Mr. Nicely, did you ever receive from any competitor any information of any kind as to the competitor's intentions with respect to prices or with respect [13,053] to terms and conditions of sale?

A. No, sir.

Q. Did you ever discuss with any competitor what National's plans might be with respect either to prices or terms and conditions of sale?

A. No, sir.

Q. Did you ever receive any advance word from any source as to price action that would be taken by a competitor before that price action had been published to the field?

A. No, sir.

Q. And that would be true with respect to the price change of December 15, 1965, you received no advance word of any sort?

A. No, I did not.

Q. You did not know in advance of U.S.G.'s announcement to the field what action they might take?

A. No, I did not.

[13,054] By Mr. WARNKE:

Q. Would the same be true with respect to the change in credit terms on March 1, 1966?

A. Yes, it would be.

Q. Now, you have testified that with regard to prices that you had no pricing authority prior to your becoming the vice president for sales in 1964–65; is that correct?

A. That is correct.

Q. And that you were a member of a pricing committee from 1965 to 1967?

A. That is correct.

Q. And you testified that in January of 1968 Mr. Jack Hayes became vice president, I believe, it was for merchandising——

A. Merchandise and operations.

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Q. And at that time he acquired authority with respect to price?

A. Yes.

Q. And since that time, have you had any authority other than to advise Mr. Hayes with regard to price?

A. No, I have not.

Q. Now, with respect to—let me ask you this. You have testified that Mr. Atwell was the only one who verified on lower competitive prices, and that some people [13,055] in the Credit Department checked credits with competitors.

Mr. Atwell, of course, reported to you; is that correct?

A. Yes, he did.

Q. And you reported to Mr. Hayes, and at various times to Mr. Cerruti, and to Mr. Tucker, and, of course, ultimately to Colon Brown?

A. That is right, sir.

Q. And I take it that all of these people that were Mr. Atwell's superiors would have had authority to verify; is that correct?

A. Yes, I am sure they would have. I was thinking when you asked that question my subordinates.

Q. Yes.

A. Yes.

Q. To the best of your knowledge did any of your superiors verify prices?

A. I never heard of one verifying prices.

Q. You have testified that your function, Mr. Nicely, throughout your career with the National Gypsum Company has been for the sale of gypsum wallboard; is that correct?

A. Yes, and other products, sales.

Q. In that connection, do you consider it your function to collaborate with competitors, or compete with [13,056] them?

A. Compete vigorously.

Q. Did you ever make any agreements at any time with any of them orally, written, by telephone conversation, face-to-face, with regard to prices, terms, service or anything else that would be offered to a customer?

A. No, I did not.

Q. Were you made familiar with the antitrust laws in the course of your responsibilities with the National Gypsum Company?

A. Yes, I was.

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[13,063] CROSS-EXAMINATION

By Mr. FRICANO:

Q. Sir, do you recall that in March, 1962, when you visited Mr. Tinsley at Groves Lumber, that, since about 1960, when Mr. Huckleberry came on stream, that there was intense competition being generated in his marketing area by the majors in meeting the competition which he was providing through his trucking concept?

[13,064] A. I had no knowledge of that. I heard this—I heard the testimony here, but I had no knowledge of that of my own knowledge.

Q. Well, is it your testimony that this time period you were responsible for the eastern portion of the United States for dealer sales?

A. That is right, sir.

Q. Well, because you were only responsible for eastern dealer sales, did you not attempt to make yourself knowledgeable with respect to the problems the company was facing in other areas, aside from your own particular territory?

A. No, I didn't. I was aware of Texas Gypsum being in existence, but as far as what Texas Gypsum and other companies did in Texas or Arizona or New Mexico or the entire west coast, I was not knowledgeable of it. I had sufficient to do in the east.

Q. But your territory did include Dallas, where Mr. Tinsley was located?

A. That is correct.

Q. And El Paso is how far from Dallas?

A. Oh, I don't know. I would say Texas is a wide state. It must be 600 miles.

Q. That far?

A. I would think so. I don't know.

[13,065] Q. Yet, Mr. Huckleberry was able to truck 600 miles into Dallas, Texas, and take business away from you, is that right?

A. He took a couple of trucks away from us.

Q. Did Mr. Tinsley ever buy wallboard from you again?

A. I really don't know.

Q. You didn't check up after you left him?

A. No, I don't think so.

Q. You visited the man, you attempted to get him to buy your wallboard, but then, afterwards, you didn't try to find out whether or not he had actually listened to what you said, accepted your sales presentation, and bought again from National Gypsum; is that right?

A. That is my testimony. I might say, Mr. Fricano, I probably made in Dallas, on that trip, I probably made 30 to 40 calls, and I did this week in and week out, and I don't normally follow back with any district manager on the results.

Q. How would you know whether you were being successful in making your visits, then, sir?

A. I didn't always know. I just hoped, if I wasn't successful, and if there was something else I could do, that the district manager would call on me to come back. You know, you are never successful on every call, so it is a——

Q. Had you ever visited Mr. Tinsley before?

[13,066] A. No, sir.

Q. Did you ever visit him subsequently, at any time?

A. No, sir.

Q. Did you know and did it come to your attention prior to the time you visited Mr. Tinsley that he was the first dealer in the Dallas market to get a truck shipment from Mr. Huckleberry?

A. I didn't know that until the testimony here by some witness.

Q. You say that you are usually advised as to who you are going to see and the situation in the marketplace by the local man, aren't you?

A. I think that I testified that I very seldom knew who I was going to call upon when I went to a district, but, when I was met by either a salesman or the manager, that I followed his regular routine. I tried not to upset a salesman's routine. I also didn't want to give them advance notice of who I wanted to see. It was just a cold turkey call, is what I called it, a cold turkey call.

Q. What do you mean, you didn't want to give whom advance notice?

A. I didn't want the district manager to prepare a routine for me that would hide, necessarily hide things that I might want to see or that I might want to find out. I just [13,067] prefer, Mr. Fricano, to make a cold—to walk in cold and call upon whomever they wanted to call upon, or whomever I wanted to call upon.

Q. You knew you were going to call on Mr. Tinsley prior to the time you got to Dallas?

A. No, I didn't.

Q. How did you select him?

A. I didn't. Mr. Forshay selected him.

Q. I must be confused.

Did you say that you wanted to drop in on dealers cold turkey, and you didn't want your local people to know whom you were calling upon; yet, it is your local people who tell you who they wish you to see?

A. That is right.

Q. Mr. Nicely, do you know of any reason at all why Mr. Tinsley took that stand under oath and would have any reason to testify falsely?

Mr. WARNKE. Object, Your Honor.

The COURT. Well, I don't like that question in the form it is in. You can ask him if Mr. Tinsley is mad at him or prejudiced against him or something like that, but the broad question you have asked invites too much speculation.

[13,068] The COURT. In other words, you can interrogate as to whether Mr. Tinsley is in any way prejudiced against Mr. Nicely or against——

Mr. FRICANO. I see, Your Honor.

The COURT. Or against the corporation, but——

Mr. WARNKE. Might I state, Your Honor, that is not the sole basis for my objection. The question assumes that Mr. Tinsley testified falsely. There has been no such statement.

The COURT. No, it does not. The question is why he should have testified falsely. It doesn't assume he did.

Mr. WARNKE. Well, my objection stands, Your Honor.

The COURT. I think Mr. Fricano would state——

Mr. FRICANO. I called him as a witness, Your Honor, and I certainly wouldn't——

The COURT. Go ahead. You may ask the questions. The objection is overruled.

Mr. FRICANO. Thank you, Your Honor.

By Mr. FRICANO:

Q. Mr. Nicely—excuse me. Mr. Tinsley had had a long history of dealing almost exclusively with National [13,069] Gypsum Company; didn't he?

Mr. WARNKE. Your Honor——

The WITNESS. I really don't——

Mr. WARNKE. Your Honor, misstatement of the record.

The COURT. He can ask him.

The WITNESS. I really don't know.

By Mr. FRICANO:

Q. Would it be correct to describe your function, at this time, in traveling around the country, visiting different locations, particularly when you felt that people weren't up to their quotas or meeting their commitments to sales, as something of a trouble-shooter?

A. No, I wouldn't—classify myself as, necessarily, as a trouble-shooter. I think I had more sales ability than most of the people in the field, and I felt that there was something I could add, supplement their efforts; but I wouldn't classify myself as a trouble-shooter.

Q. But you did try to correct situations which were creating problems for your clients—not for your clients, for your company?

A. Well, I tried to assist, in addition to sales, and I certainly had the responsibility of training managers. I didn't feel like I should appoint a district manager and then pitch him out in the field without training, and we had [13,070] what we call on-the-job training. We had no formal management training, so therefore, it was necessary that either I train him or someone else train the managers, so I felt that was a very vital part of my job, to train managers.

Q. All right. Let me ask you this, sir. Do you remember what problems confronted the National Gypsum at the time that you visited the Dallas market in 1962?

A. I think it can all be summed up that we had lack of sales.

Q. Were your sales being lost to Texas Gypsum Company?

A. Well, when I found out that, in Dallas, that there were only two trucks of Texas Gypsum Company board that had been shipped, I couldn't say that our problem was caused by

competition in the shipment of Texas Gypsum Company. You are talking about 50,000 feet, and that certainly isn't enough to get too excited about. If they sold 5,000,000 feet or 500,000 feet, I might say our trouble was caused by Texas Gypsum Company, but two trucks wouldn't have caused the situation I had in Dallas.

Q. Well, sir, when a new competitive situation presents itself in the marketplace by a new competitor, such as Texas Gypsum Company, might not the first two truckloads be the forerunner of two hundred truckloads?

A. Oh, it probably could. It is highly improbable, [13,071] but it possibly could.

Q. Did Mr. Huckleberry move his plant, subsequently, to Irving, so he could service the Dallas-Fort Worth market more economically?

A. Yes. I think he moved it in 1964.

Q. And did he not truck substantial quantities of gypsum wallboard in the Dallas-Fort Worth market?

Mr. WARNKE Objection, Your Honor. The testimony is the plant was moved two years after his call and, therefore, it could not be connected with this call.

The COURT. You can answer the question.

The WITNESS. I am sure he shipped more board than he had shipped, and I am sure he took some of our customers. There is no question about that.

By Mr. FRICANO:

Q. Did you keep track of Mr. Huckleberry, his Texas Gypsum Plant and his trucking subsequent to the time you visited Mr. Tinsley?

A. No, not specifically, I didn't.

Q. Now, you testified, on direct examination, that, when you approached Mr. Tinsley, I believe your words were that you tried to get him to buy National Gypsum wallboard by offering him a topnotch product. By comparison to what?

[13,072] A. Well, I feel that we have always made a—I use the word again—topnotch or a fine product. I don't quite agree with all of the testimony that has been put forth here from this witness stand that all vanilla board is the same. I think that we have the finest vanilla board on the market. There are lots of things that make our board better, I think. I certainly think it was better than Texas Gypsum, at that time, who hadn't had

the experience. I think it is better than USG's or else I wouldn't be selling our board, so, to me, I am giving him a topnotch product. I am also giving him services he can't get from other people.

I have a large sales force in Dallas. I have an architectural force in Dallas, who call on architects, who call on home builders, who create a desire for our product.

We have a long range of products. We have Durasan, a finished product. We have lath. We have plaster. We have many things to offer Mr. Tinsley that Mr. Huckleberry or the Texas Gypsum Company could not offer him. If I only sold on price, and quality would be the same, I wouldn't—I suppose I would lose lots of business.

Q. Yes; but Mr. Tinsley wanted trucking, didn't he?

A. Yes, I think Mr. Tinsley did want trucking.

Q. And, Mr. Tinsley didn't need to have trucks brought in, because he had a rail spur; didn't he?

[13,073] A. I don't think Mr. Tinsley had a rail spur. This has been 13 years, but, if I recall Mr. Tinsley's lumber yard, it was on the main street. He had a large store. It was on the main street, and I don't believe he had a siding. It is quite possible, but I don't believe so.

Q. Did you instruct any of your salesmen or any personnel from National Gypsum Company to obtain a sample of Mr. Huckleberry's board so you could test it?

A. No, I did not.

Q. You did hear Mr. Tinsley talk about salesmen from various companies, I think, including National, requesting Texas Gypsum board so they could ascertain its quality?

A. Yes, I did.

Q. Now, was Mr. Atwell—well, I will withdraw that. Mr. Atwell was under your jurisdiction; was he not?

A. At some times, he was. Yes.

Q. Well, from 1965?

A. Probably all the time, up to '73; yes.

Q. Yes, sir. All right. Were you one of the people that—at National, one of the officials responsible for insuring that National Gypsum and Mr. Atwell complied with the antitrust policies of National?

A. Yes, I guess, as an officer, I would be one of the [13,074] persons concerned with it.

Q. In fact, page two of your antitrust procedure, which is National Gypsum No. 77, specifically states that:

> Every officer, corporate division, or subsidiary and within each division or subsidiary, each district, division, regional and general manager is responsible for the education of and compliance by personnel under his jurisdiction with this policy and procedure.

Do you recall that, sir?

A. Was that in Mr. Wagner's——

Q. Yes, sir.

A. Yes, I recall that.

Q. Now—now, if Mr. Atwell, while engaging in price checking, both on terms and credit and other matters, services, engaged in comments or discussions of any kind, explanations, or cut prices, or explanations of extended terms, things of that nature—based upon your study of the policy of the company, would he have been violating that policy?

A. Well, I would like to know what you—what you mean as to him talking.

Q. An example?

A. Give me an example.

Q. All right. I will try to give you an example. [13,075] It might facilitate matters.

Why don't you take a look——

Mr. FRICANO. May the witness please have 982 and 983, Mr. Grainer?

By Mr. FRICANO:

Q. And, while he is getting them, I will describe these documents, Mr. Nicely, because they are in evidence.

982 is dated December 22, 1967, and it is from Regional Credit Manager D. D. Kent, who has testified in this case already, as you know, to Mr. Nicely and Mr. Barber, who is the general credit manager, with a copy to Mr. Atwell, in sales.

Now, in that document, sir, in the first paragraph—and it is addressed to you——

A. Excuse me; 982?

Q. 982, yes. Now, we have—here, we have a situation, and I will read it, rather than characterize it.

It says here, in the first paragraph:

> On September 19th, R. D. Barber spoke with Bill Hogan, U. S. Gypsum's General Credit Manager. Hogan confirmed USG is allowing 21st cut-off on gypsum dealer products shipped into Clay and Jackson Counties of Missouri.

It goes on:

> These two counties comprise a portion of the metropolitan area of Kansas City, [13,076] Missouri. Since the entire state of Kansas is allowed 21st cut-off, it is only realistic to grant the same terms to the metropolitan area of Kansas City, Missouri.
>
> Do you approve meeting the confirmed competition of USG and allow 21st of the month cut-off in Jackson and Clay Counties of Missouri only for dealer gypsum products, including other tip-loaded items, shipped into these counties?

And then there is an approved—two approval lines, Mr. Barber approved it, and then I believe that that is your signature—is it not, sir?—approving meeting this situation with United States Gypsum?

A. Yes, it is my signature.

Q. Now, with respect to job—excuse me.

With respect to credit discussions with United States Gypsum, is this with a specific account?

A. No, it is with a specific area. It might have been a zone. It might have been—instead of Clay and Jackson, it could have been a specific zone, a question about a specific zone.

[13,077] By Mr. FRICANO:

Q. Well, is it permissible then, as you conceive and understand your antitrust policy, that Mr. Atwell could give out information covering entire zones, large zones, large geographic areas with respect to credit, and in turn ask competitors for the same information?

Mr. WARNKE. Objection. Your Honor, on two grounds.

First of all, the question asks about current antitrust policy, and I assume we have to translate that back to sometime prior to the indictment. And, I think the question should be limited to 1967, which is the date of this document.

Secondly, it assumes that the document relates to the furnishing of information by Mr. Atwell, and there is no indication of that.

The COURT. Your question was phrased, as I understand it, to discuss current policy. We are not interested in what their current policy is.

Mr. FRICANO. I didn't mean to. I thought I tried to limit it. Well, let me restate it then, Your Honor.

The COURT. All right.

By Mr. FRICANO:

Q. Between the time period, sir, when you first [13,078] became aware—I believe you testified 1965—that Mr. Atwell was engaging in these conversations with competitors, and the time which you have testified allegedly he stopped engaging in such conversations with competitors, was he allowed under that policy of verification, as expressed on No. 77, the antitrust compliance policy, to obtain information from competitors like United States Gypsum, covering entire portions of the country?

Mr. WARNKE. I have to object again, Your Honor, on the ground that the document refers to a call made by Mr. Barber and not by Mr. Atwell.

Mr. FRICANO. It is copied to Mr. Atwell, and Mr. Atwell was the man who was doing some of this, as he testified to.

The COURT. Do you want to ask about Mr. Barber.

Mr. FRICANO. All right, sir, I will ask Mr. Barber.

By Mr. FRICANO:

Q. My question again, sir, is with respect to Mr. Barber, not Mr. Atwell.

Under your antitrust compliance policy, was it permissible for Mr. Barber, your General Credit Manager, to contact United States Gypsum, and vice versa, and ascertain information relating to entire zones where there were [13,079] numerous customers?

A. I don't know whether you understand it. I had no authority over credit whatsoever.

Q. Sir, isn't that your signature?

A. Yes, it is.

Q. Well, if you had no authority, why is it that your approval is on here?

A. Well, maybe I should explain what my approval means on a credit document.

Theoretically, I approved of this. Many things I have approved on documents similar to this has not been approved with the credit department. It is certainly normal of the credit department to keep me advised of what was going on with the credit department, and certain things I would approve of it

would not be put into effect, and vice versa. I have disapproved things which the credit department approved of.

And, normally if they related to sales, they would not be approved of by the credit department.

Q. I guess I am confused again, sir.

You mean when you sign off on a document like this, giving your approval to make your billing date the same as United States Gypsum, that doesn't mean it is your approval?

A. I approve of it, yes, but that doesn't mean that the credit department will approve it. I had no authority [13,080] over terms. I had no authority over many things. But, many things were brought to my attention and I approved of those things. But that didn't mean that they would be approved subsequently.

Q. All right, sir.

Well, let's look at 983, if you will please. 983 is dated January 22, 1968. Here again it is from the regional credit man, R. J. Kramer, and it is directed to E. E. Williams, to you, and Mr. Barber, the General Credit Manager.

And it states:

> Grace period extension, the Monday following if 25th falls on a Saturday or Sunday. 2 percent cash discount only. Customer. G. L. Wright, and so forth.

And again Mr. Barber signs with his approval and you sign with your approval.

Now, the back-up documents for this approval show that the first contact with respect to this customer was on March 8, 1967, when a Mr. Griffith wrote to the credit file as follows:

> On March 6, 1967, I phoned Mr. Sabel of U. S. G. He told me that they do not base their grace period on working days, they base it on number of calendar days, which is 5. But if the 25th comes on a [13,081] Saturday or Sunday, then the grace period is extended to the following Monday. Sabel said that this has always been their practice for all accounts.

And then a handwritten note at the bottom states:

> Discussed with Sabel, U.S.G., January 22, 1968. Still the same situation as explained above.

And, on the basis of that information, as it is attached to this, you gave your approval on this document to doing the same thing that United States Gypsum was doing; did you not?

A. Well, I think that when I approved this document here, which is dated January 22, 1968, I doubt seriously if these other documents were attached to it. They might have been. But, yes, I would have approved of it. Posnak and Turkish was a large account, and I would have approved of it. And if I hadn't have approved of it, and if the credit department hadn't approved of it, I would assure you that Mr. Turkish would have taken the discount.

Q. Sir, with respect to the explanation and the words that are contained in Mr. Griffith's memorandum of the discussion held with Mr. Sabel of United States Gypsum, is that kind of discussion between two competitors the kind that you considered to be proper within your antitrust compliance policy?

A. Well, again I had nothing to do with Mr. Griffith [13,082] in the credit department. But it looks to me like he is discussing a specific situation of one account for one period. And, based upon that, it would seem to me it would fall within our policy.

Q. Well then, are discussions and explanations permissible between officials of your company, who had the authority to verify, and officials of other companies?

Mr. WARNKE. Objection, Your Honor. Inconsistent with the document.

Mr. FRICANO. If Your Honor please, this document here shows a discussion and an explanation, and I read the words.

Mr. WARNKE. Your Honor, I have heard the words, and I have read the words, and they contain no discussion and no explanation.

The COURT. Let me read the words.

Mr. FRICANO. It is on page 2, Your Honor.

[Judge examining document.]

The COURT. Ask him about what it says, rather than something that we can get into an argument about, such as discussion.

Mr. FRICANO. I will try it this way, Your Honor, if I may.

The COURT. There isn't any reference [13,083] to any discussion there, so let's limit it to what it says.

By Mr. FRICANO:

Q. Does this document show that in the conversation with Mr. Griffith, with Mr. Sabel, that they limited themselves to strictly yes-no answers?

A. Well, I don't know what Mr. Griffith said to Mr. Sabel, and I don't know what Mr. Sabel said to Mr. Griffith. What this document is is a credit file document which Mr. Griffith had evidently written to himself, and probably just to cause him to remember it. And I don't know what they said to each other.

And, normally sometimes when you write a document you put words in it which you didn't say in the conversation, so I have no idea what Mr. Griffith said to Mr. Sabel or vice versa.

Q. You testified that these two documents that are attached to the cover memo may not have been attached before when you looked at it. Sir, I direct your attention to the lower right-hand corner of these documents, and they show Grand Jury Submission numbers, 1, 2, and 3 on the last digit. Do you see that?

A. Yes, I see that. I don't know what they mean. 28001. But, I still doubt seriously if Mr. Griffith would have sent me a credit file, his own credit file, something for me to sign.

[13,084] The COURT. That merely means that they were attached together when they were submitted pursuant to the Grand Jury subpoena.

Mr. DELONE. I beg your pardon. It doesn't mean that they were attached together. They were in sequence.

The COURT. They were submitted one after the other.

Mr. FRICANO. If Your Honor please, I can ask one question to clear it up.

By Mr. FRICANO:

Q. You do have 983 in front of you, the one we are talking about; don't you?

A. Yes, I have.

Q. Now, doesn't it say for the reason for meeting this situation, "To meet competition U.S.G. See attached."

A. Yes, that's what it says. There is two attachments, Mr. Fricano.

Q. Now, with respect to this approval in January of 1968 for Posnak and Turkish, Inc., Jersey City, New Jersey, sir, do you know if that extended into 1969 or 1970, or 1971?

A. Just from looking at this document, it looks to me like it is for a specific period. The approximate value is $15,000, and it would not extend into—as far as I can [13,085] see—into a period beyond this one billing date.

[13,086] By Mr. FRICANO:

Q. Now, if you would look at 988, please.

[A document is handed to the witness by Mr. Grainer.]

Mr. FRICANO. While that is being obtained, this is in evidence, and I will describe the document.

This is dated—at least some of the handwritten notes thereon are dated in July, 1968. And what the document is, and you can look at it yourself, Mr. Nicely, is a buckslip from the desk of Kenneth Atwell, your subordinate, and it states, "Bob Barber Credit. Would you please verify this." And it's signed, "Ken." And attached to those documents are memoranda dealing with the Volka Building Supply Corporation, and that memorandum is dated June 21, 1968, and it deals with a competitive situation which National Gypsum is allegedly facing in connection with its competition for the business of Volka Bulding Supply Corporation with regard to the following competitors: United States Gypsum; Celotex; and Georgia-Pacific.

Now, the first note on Mr. Atwell's buckslip says:

> 1. Phoned—Hank Sabol, USG, July 16, 1968. No special terms. They sell Volka Supply Company, Inc. not Volka Building Supply Company, Inc. They do not [13,087] discount at 5 percent. Normally discount at 2 percent.

By Mr. FRICANO:

Q. Is that an appropriate and proper so-called verification within the policy enunciated in National Gypsum 77?

A. Mr. Fricano, I couldn't answer that because I don't know what went on in the phone conversation between Mr. Griffin and Mr. Sabol.

Q. All right, sir.

Then I guess your answer would be the same with respect to the other two notes which show phone conversations with someone at Celotex, a Steve Cocchis, I believe, or Cocchio, I am not sure, and a phone conversation with an unidentified person at Georgia-Pacific.

Would your answer be the same——

Mr. MELLOTT. I object to that statement. It improperly reflects what is in the document, the comment which he has just referred to, instead of reflecting a phone call with Georgia-Pacific reads as follows:

> We do not exchange credit info with Georgia-Pacific (Bestwall) because they do not keep our inquiries confidential.

By Mr. FRICANO:

Q. Do you know what that means, sir?

A. No, I don't.

[13,088] The COURT. Well, I guess the jury can interpret what it means if it has any bearing.

Mr. FRICANO. Mr. Grainer, may he have 152, please, Government Exhibit 152.

[An exhibit is handed to the witness by Mr. Grainer.]

By Mr. FRICANO:

Q. Mr. Nicely—I am sorry, sir. We won't go into that one.

Now, your antitrust policy states, the antitrust policy that became effective December 1, 1967, and this is National Gypsum 77——

Mr. WARNKE. Objection, Your Honor. The testimony was that it stated what the policy had been previously. It was just a confirmation of it.

Mr. FRICANO. The policy is written on December 1, 1967, and it states the following:

Mr. WARNKE. With that restatement, Your Honor, I have no objection to the question.

The COURT. All right.

By Mr. FRICANO:

Q. Well, with regard to that, Mr. Nicely, it is the practice, and as you testified has been going on to your knowledge since at least 1965; do you know of any reason why the policy of price checking or verification, [13,089] call it what you will, was not reduced to writing beforehand?

A. You started out your question, "In regard to that . . . and I am a little——

Q. With respect to this policy that was put in writing on December 1, 1967, concerning discussion of competitive situations with competitors.

Do you know why that was not reduced to writing until this time period when, in point of fact, you knew that it was going on at least since 1965?

A. I don't know that it wasn't reduced to writing in some other form. I do know that Mr. Wagner took it upon himself to do a complete book on company policy, and at what time he started this, I don't know. But he took all the policies, I guess, that he could gather and put them in a book which used this format so that all policy would come within the same format.

I recall the writing of policy myself, and he wouldn't let it go out because it was in the wrong format.

Q. All right, sir.

Now, your policy states, at least the written policy as shown on National Gypsum 77, and I quote:

"It is not unlawful to check directly with a competitor"——

A. May I have the page, sir.

[13,090] Q. That is page 8 of 12.

A. Dated '69?

Q. Dated 12/1/67.

A. Yes, I have it.

Q. Now, in the middle of the right-hand column it states, the second full sentence:

> It is not unlawful to check directly with a competitor (but without comment or discussion of any kind) about a past or present fact—what prices, terms or conditions of sale he had charged or quoted—but it is dangerous because of adverse inferences which may be drawn from any competitor contact on these subjects. However, if information or rumor at the consumer level indicates a significant price change may be occurring, direct confirmation of past actions, at the competitor level (without comment or discussion of any kind), may be preferable, in spite of possible adverse inferences, to the loss of business which may occur if the company does not promptly confirm and take its own independent action. Such contacts shall be made only by persons authorized by management and who will have direct responsibiity to keep such contacts limited and lawful.

Sir, to your knowledge did Mr. Atwell stay within the meets and bounds of that policy as it is written in this [13,091] document?

A. I think he would follow this policy to the letter, yes, sir.

Q. Well, do you know to your knowledge that he did?

A. Well, I don't think I ever heard Mr. Atwell make a call, so I couldn't say to my knowledge, no, sir. I just know Mr. Atwell, and I think he would conform to this policy.

Q. Sir, Mr. Kroth—whom you testified to on direct examination, and I think you acknowledged the fact, and Mr. Kroth did testify here, and Mr. Warnke asked you questions based upon the testimony Mr. Kroth gave—do you know how long he worked for National Gypsum?

A. Mr. Kroth?

Q. Yes, sir.

A. Quite a while, probably 18 or 20 years. I don't recall.

Q. When he left National Gypsum, did he leave with good relations between officials of the company and himself?

A. I think so. Yes, I know when he left I spent probably a half a day with Mr. Kroth upon him leaving trying to point out that he shouldn't leave because he was a valued employee, and we certainly discussed what his future was going to be. I advised him against leaving [13,092] because at that time he had been with us so long and he had created such a nice retirement fund that he could not possibly equalize it with his remaining years of work; however, he did leave us just the same.

[13,093] By Mr. FRICANO:

Q. He was a valued employee?

A. Oh, yes, he was valued employee.

Q. And this valued employee took the witness stand and stated without hestitation or qualification, from time to time you instructed him to make such verification calls, is that not correct?

A. I don't exactly recall his testimony. I have not read it since. But I do recall him saying that I had instructed him to. I was amazed he said that and I was amazed that he had been making any verification calls.

Q. Did you also know at this time, on or about this time, that Mr. Webster, who also worked for Mr. Atwell, was making and receiving such telephone calls?

A. No, I did not. Both were surprises to me.

Q. When Mr. Atwell wrote his December, 1969 memorandum, which is in evidence, which was referred to this morning, indicating in that memo that perhaps Colon Brown should be advised, if he doesn't know already, that earlier that year Mr.

Atwell had stopped the practice of price checking; that that memorandum was responsive in part to the fact that Mr. Atwell found out that Mr. Webster during 1969, from time to time, was continuing to engage in the practice of price checking.

Mr. DeLone. I object——

[13,094] Mr. Warnke. Objection.

Mr. DeLone [continuing]. To that testimony by Mr. Fricano now, which is not consistent with the record, and assertions and arguments. It is not a question at all.

The Court. I don't know what it is. I don't understand it, frankly.

Have you asked the question?

Mr. Fricano. Yes, Your Honor, I did.

I said with respect to the December, 1969 memorandum, which Mr. Atwell sent to various officials of the company—and I think Mr.Nicely was one of them—did he know this memorandum came to be written in part due to the fact Mr. Atwell found out Mr. Webster had been exchanging prices in 1969 with competitors.

The Court. Do you understand the question, Mr.——

The Witness. I think I understand it, but I wouldn't be able to answer it, unless I looked at the document again, because I just briefly looked at it this morning. Whether he stated that in his letter, I don't recall. If he didn't state it in the letter, I wouldn't know that was the reason for him writing the letter.

By Mr. Fricano:

Q. In other words, he wouldn't have talked to you about the memorandum?

[13,095] A. I don't think he would have talked to me about the memorandum. If he would, he wouldn't have written me the letter.

Q. Did Mr. Wagner, who prepared the National Gypsum antitrust compliance policy, when he substituted in 1969 a new page 8 which indicated that the exchange of competitive information between National Gypsum and its competitors was no longer proper, do you know why he waited until December, 1969, to put this new change in policy into the antitrust compliance program?

A. No, I don't know.

Q. He didn't tell you why?

A. He didn't tell me why.

The Court. So there is no misunderstanding about it, it is not against the law to violate company policy. That is not a violation of federal law.

It might get you in bad with the boss, but it is not in violation of the federal law.

Mr. Fricano. May the witness have 29 and 30–A, please, Mr. Grainer.

The Witness. I have 29 here.

What was the other one?

And 30–A, yes, I have it.

By Mr. Fricano:

Q. Now, GX 29, sir, which you testified, and 30–A, [13,096] both of which you testified to on direct examination, have been described—at least GX 29 has been described as Mr. Atwell's speaking notes which he used in giving a talk to various regional managers. Do you recall that?

A. I recall these being referred to as speaking notes, yes.

Q. And did you testify on direct examination that you did not, or you don't recall having been present when Mr. Atwell gave these notes or gave his talk, I should say?

A. Yes, I testified to that.

Q. Well, I am sorry, sir. I am trying to draw the distinction. I didn't state it very well.

Was your testimony that you were not there, or you do not recall being there?

A. I think I testified I did not recall being there.

Q. Now, in this document, Mr. Atwell's speaking notes, he cautioned certain of the regional managers—I believe Mr. Gerber, Mr. Phillips, Mr. Stewart, about if they chose to discuss prices with competitors, he had certain caveats, or certain things they weren't supposed to do if they ever got into a discussion of prices with competitors and one of them was to refrain from making notations on files or note pads regarding your conversations with competitors' employees.

The Court. Do we know as an evidentiary matter that he said that?

[13,097] Mr. Fricano. He so testified, Your Honor, I believe.

The Court. All right.

Mr. DeLone. I didn't think Mr. Atwell said—he acknowledged that this was his talking notes. He didn't know precisely what he said.

The COURT. I don't know, but I sometimes make up talking notes, speaking notes, and then I don't say it. So I don't know if there is such evidence. If there is, you may proceed.

Mr. DELONE. And the document does not say what Mr. Fricano said, anyway, Your Honor.

The COURT. The witness has got the document.

Go ahead.

By Mr. FRICANO:

Q. He gave this seminar—I call it a seminar—he gave this talk to these people because on or about this time these regional managers were given new authority on their own to discount as much as three 5's off the list price of National Gypsum, is that not correct?

A. I really don't know. I couldn't testify to that, based upon these.

Q. Would you look at 892, please?

Mr. FRICANO. May he have GX 892, please, [13,098] Mr. Grainer?

The COURT. Didn't you ask Mr. Atwell about this kind of thing?

Mr. FRICANO. Yes, sir, but this information was directed to Mr. Nicely, too.

The COURT. But he wasn't there.

Mr. FRICANO. He said——

The COURT. He doesn't know whether he was.

Mr. FRICANO. Well, the evidence will show, and has shown through Mr. Atwell, that he placed Mr. Nicely at the meeting, sir.

The COURT. Ask your question.

Mr. WARNKE. I believe, Your Honor, that is not correct.

The COURT. I don't know whether it is or not, but if Mr. Nicely doesn't remember being there, I don't know what difference it makes what anybody says.

Mr. FRICANO. All right, sir.

I will forgo that.

By Mr. FRICANO:

Q. It is correct to state, then, with respect to 30–A, which is Mr. Atwell's memorandum principally directed to you as the first party to receive it, that you don't recall reading his correction of the things that he said three days [13,099] before, is that right?

A. No, I don't, and I am not sure, Mr. Fricano, I am the first party to receive it. I think I enjoyed that along with four or five others there.

Q. You are at the top of the list.

A. Yes. This is—this is, I guess, a point of the way you look at it.

Q. If Mr. Kroth and Mr. Webster, who also received copies of this document, were not authorized to engage, to your knowledge, in price checking or price verification, as you have described it, did Mr. Atwell ever tell you why he sent copies of this document to them?

Mr. WARNKE. Objection. The testimony has been the document in Mr. Nicely's opinion had nothing to do with verification of price.

The COURT. He wants to know whether the man ever told him why he sent it.

Do you know?

The WITNESS. No.

The COURT. All right.

We will take a ten minute recess.

[13,100] By Mr. FRICANO:

Q. Mr. Nicely, I only have a very limited—two or three more limited areas to go into, sir.

First, when you changed your credit terms on March 1, 1966, effective March 1, 1966, at that time, did Mr. Colon Brown, Chairman of the Board, pull onto himself exclusively authority to allow or disallow deviations or extensions of credit after that date?

A. I really couldn't answer that question, Mr. Fricano. I don't know.

Q. Did you not testify, on a prior occasion, at page 457, as follows:

> Question. Now, was Mr. Brown also the person who was solely exercising the authority to grant extended terms on gypsum wallboard, since December 15, 1965?
>
> Answer. Would you ask that question again?

The reporter read it back.

> Answer. Yes.
>
> Question. Now, that would be true whether we are talking about situations to meet competition or to change a published term and condition; correct?
>
> Answer. Yes.

[13,101] Were those questions asked of you, and did you give those answers, sir?

A. Yes, if it is on there, I gave the answers.

Q. And that was on January 25, 1968. Now, sir——

Mr. WARNKE. Could I have that date again, Your Honor?

The COURT. January 24, 1968.

Mr. WARNKE. 1968.

The WITNESS. Excuse me. I might say that the—we were not meeting any competition, so, therefore, no one was meeting any exception, so I guess he was the only one that could meet it.

By Mr. FRICANO:

Q. In fact, your memorandum, which was alluded to by Mr. Warnke—or not your memorandum—yes, it is your memorandum, National Gypsum 17, dated May 24, 1967, states as follows, in that connection, does it not? It says:

> Since December 15, 1965, our company has not varied one penny from the published price list on gypsum products, and it is our intention to keep our published price list as the only basis for selling.

Do you recall writing that, sir?

A. Yes, I think I recall writing it, and I might have taken poetic license on that "not one penny," but I [13,102] remember writing it.

Q. How long did that situation continue?

Mr. WARNKE. Objection, unless it is made clear whether we are talking about variations on credit terms or variations on prices, because Mr. Fricano referred to both, and the memorandum he just read refers to variations on prices.

By Mr. FRICANO:

Q. For how long a period of time, sir, after May 24, 1967, did the National Gypsum Company continue its policy of not deviating from its published list price?

A. I think you could say that that lasted until Mr. Hayes was made vice president of merchandising operations, which would have been early in 1968.

Q. Thereafter, did National, from time to time, give a discount in the marketplace?

A. After January 1, or somewhere in early 1968, yes, I think we gave some. I think we met some competition.

Q. Were prices reasonably stable in the marketplace, from your standpoint, at least, up until September, 1968?

A. No, sir.

The COURT. Perhaps I am the only one that is confused on this, Mr. Nicely, but I want to ask you this.

In the period December 27, 1968, through December [13,103] 27, 1973, Mr. Colon Brown was Chairman of the Board; is that right?

The WITNESS. Yes, sir.

The COURT. Who was next in line to him in the corporation?

The WITNESS. Well, it is—'73, I think we had a president in there for two years—Mr. Tucker, and then, after that, was Mr. Hayes.

The COURT. All right. Now, where did you fit in?

The WITNESS. I fitted down below Mr. Hayes. I was at the fourth level.

The COURT. You were at the fourth level?

The WITNESS. Yes. Mr. Brown, Mr. Tucker, Mr. Hayes, and then I came in.

The COURT. All right.

By Mr. FRICANO:

Q. Now, with respect to the information which was given over the telephone to Mr. Jack Hayes in November of 1965——

The COURT. By whom?

By Mr. FRICANO.

Q [continuing]. By Mr. Wright, who was their Chicago—I think regional sales manager——

[13,104] A. He was division manager.

Q. Division manager?

A. Yes.

Q. What did Mr. Hayes tell you about that?

A. Well, I can't remember the exact words, but I think I can remember them fairly well.

Some time during the day, he told me that he had received a call from Mr. Wright, and that Mr. Wright told him that he had seen an announcement of USG's, announcing a price change. It was the one that would be effective December 15, 1965.

[13,105] By Mr. FRICANO:

Q. Did he also tell you that Mr. Wright called him—"him" being Mr. Hayes—from Milwaukee, Wisconsin?

A. I think I so testified to that in a—maybe in a deposition or something.

Q. Was it true then, and is it true today?

A. Well I was—To the best of my recollection at that time, yes.

Q. Now, did you participate in decisions in November 1965 with respect to the change in prices on December 15, 1965?

A. Yes, I did.

Q. Was it a joint decision between you and Mr. Colon Brown with respect to that price change?

A. I don't think you could confine it just to me and Mr. Colon Brown. I think there were several people. I think Mr. Atwell was in it. Mr. Manske was in on it. Maybe at one time Mr. John Brown was in on it. And Mr. Colon Brown. I think there were several people.

Q. Would that also be true with respect to the credit change?

A. What credit change?

Q. I am sorry, sir. The change in terms and conditions of sale that were made effective by National Gypsum on March 1, 1966.

[13,106] A. I don't recall who all was in on that. I know we discussed it, and it was an on-going discussion on some of those things, and I really don't know who made that decision. That was in the credit department or in the treasury department. It didn't come directly under me, and I really don't know who all was in on that discussion.

Q. Is it your testimony then that you did not participate in that?

A. Oh, no, that's not my testimony. I did discuss it, and I was—I guess part of the decision, probably some of the input I had. I don't know whether I was present at the time the decision was made, but I am sure that some of the input I had was used.

Q. All right, sir. Now with respect to your travels, you say that you spent 60 per cent of your time approximately between 1965 through 1973 on the road traveling?

A. I think that's a good close approximation, yes. The reason I say that, I just happened to look at 1962, and I think I looked

at the '69 expense reports. And, I believe that if you check those you'd find that I made in 1962 about 33 or 35 trips out.

Now, they are not all weekly trips, but some of them were two-week trips. But I made 35 trips out. And, prior to '62 I probably made more than that. I was out most of the time.

[13,107] Q. All right, sir. Now, while you were on your trips, did you learn of certain competitive situations in the markets that you visited?

A. Oh, I am sure I did.

Q. Now, when you returned from these trips, did you ever tell Mr. Atwell concerning these situations?

A. I have no recollection of telling Mr. Atwell. I normally wouldn't have done that. It would have been highly unusual for me to have done that.

[13,108] By Mr. FRICANO:

Q. Why?

A. Well, the flow of communications wasn't from me to Mr. Atwell. Certainly if we had a district manager worth his salt, Mr. Atwell would have known about it long before I got back. I wasn't in a habit of going to Mr. Atwell and making a report on my calls.

So, under a normal situation, I would not have reported to Mr. Atwell.

Q. Please forgive me, I didn't mean to suggest that you were making a report to Mr. Atwell.

Well, was there any way, or did you instruct your divisional manager, the man in the marketplace, to make sure that Mr. Atwell got the information?

A. Well, they had those instructions, I suppose, from me at one time or the other. Maybe more than once. But they also had those instructions from their immediate superior.

Q. And this type of information which you uncovered in the marketplace pursuant to going from dealer to dealer—as you have testified you did—that kind of information would be the kind of information that Mr. Atwell would need and use in the job that he was performing; is that not true?

A. Well, I don't think I testified that I uncovered [13,109] a lot of information in the marketplace, and I am not sure I uncovered anything new that Mr. Atwell didn't already have.

I am sure that I must have run across some competitive situations and discussed it with the customers in the marketplace.

But I might say that it was up to the salesman to take that information to—if it was new information, to take that information to the district manager.

And for the district manager, they had certain lines of communication. It wasn't up to me. And I might have gone out the next week and forgot to have told Mr. Atwell, so I am sure he didn't depend upon me to bring it.

Q. Now, sir, did Mr. Atwell from time to time discuss with you competitive problems that he had uncovered through his subordinates in the marketplace?

A. Oh, I am sure he must have discussed, in the normal course of business, competitive situations with me. I can't recall a specific one, but I am sure that it would be highly unlikely that they didn't discuss some with me.

Q. And finally, sir, are you able to identify——

Mr. FRICANO. May he have 501, 502, and 503. I am sorry, 500 through 503. I am off on that.

Mr. WARNKE. May I ask, Your Honor, are these GX exhibits?

Mr. FRICANO. Government exhibits, Your Honor, yes.

[13,110] Mr. WARNKE. 500 through 503?

Mr. FRICANO. 500, 501 through 503, Your Honor.

I am sorry, 500, 501, and 502.

By Mr. FRICANO:

Q. These have been displayed before on bigger charts, as you probably saw, Mr. Nicely. We won't bring those out now. They are all entitled "Plan of Action Relating to the December 15, 1965 Price Increase."

Can you identify as having seen any one of these three at or about the time when they were prepared?

A. I can testify without any doubt that I saw 501 on the 17th of November, and that I was personally responsible for the GX Exhibit 500 and 502.

Q. You prepared those?

A. Yes, I did. Or my secretary did.

Q. Which ones were prepared in what order?

A. I placed them in the proper order here.

501 was a plan of action which was prepared in Mr. Fred Manske's office. He was then President.

500 was one which was prepared by me or my secretary.

502 was a final one. That was prepared, and that was the one which was finally given back to Mr. Manske and told that all of these things had been accomplished.

[13,111] Q. Now, 500 has some handwriting on it. Was that Mr. Atwell's handwriting?

A. Yes, it is.

Q. And was this a copy that you provided to him?

A. It is either a copy provided for him, or else it is a copy that I had and he and I discussed it and he made those changes.

Q. Now, if you had the information from the field—Mr. Wright, who called it in from Milwaukee to Mr. Hayes—that National Gypsum was changing its prices effective December 15, 1965——

A. You mean U.S. Gypsum?

Q. That's what I meant.

A. Yes. Yes.

Q. Why is it then in the first document that was prepared, which you have identified as Government Exhibit 501, that the effective date that you planned for National Gypsum was December 18?

A. Well, that just happens to be the date when Mr. Manske was writing this that Mr. Manske and Atwell and myself decided to put this into effect. No other reason. It is just—I think I have testified, and you probably know it—that we normally, for many reasons, made out price changes effective on the weekend or on a Monday. Outside of that, there is no other reason.

[13,112] By Mr. FRICANO:

Q. Have you always had as clear a recollection, sir, of how these documents originated as you do today?

A. Yes, sir.

Q. Sir, is it within the policy as you understand it of National Gypsum to seek and obtain from competition price lists?

A. Well, at one time I don't think it was against the policy of National Gypsum to obtain already published price lists which had become public knowledge. It certainly was against the policy of National Gypsum, and it was so stated in Mr. Wagner's treatise, I believe, that it is against the policy to obtain anything which has not been published and isn't public knowledge.

Q. Well, were you not asked the following questions and gave the following answers at page 501 of prior testimony.

> Question. Where did you ordinarily procure them?
> Answer. From the field.
> Question. You don't call USG up and ask them for a price list and things like that, do you?
> Answer. No.
> Question. That is against company [13,113] policy, isn't it?
> Answer. Would you ask that question again.
> Question. Isn't it against company policy to call the competitor, the U.S. Gypsum Company, and ask them for a price list?
> Answer: Yes.

Were you asked those questions and did you give those answers at a prior time?

Mr. WARNKE. I object, Your Honor. That is not inconsistent with the testimony.

The COURT. It is not inconsistent with the testimony.

Do you want Mr. Nicely to repeat what he said before? He said it once wasn't against the policy.

Isn't that what you said, Mr. Nicely?

The WITNESS. Yes, it was not for documents.

By Mr. FRICANO:

Q. When was that, sir?

A. In answer to your question just a minute ago, I think it was not against our policy to ask them for price lists which had already been published, and the prices which already were in effect. It was against our policy to ask for a price list or any information which was not [13,114] public knowledge. And I think what you read there, if you search out a little further on, I so testified in that same document that I was speaking about only against our policy to ask for documents which had not become public knowledge and had not been published.

Q. Then with respect to published prices now as distinguished from the other kind——

A. Yes.

Q. ——did Mr. Atwell to your knowledge, from time to time, when prices changed, both furnish National Gypsum's price sheets to competitors and in return obtain such price sheets?

A. I could not answer that yes of my own knowledge.

Mr. FRICANO. No further questions, Your Honor.

The COURT. Is there any redirect?

Mr. WARNKE. I have just one set of questions, Your Honor.

RE-DIRECT EXAMINATION

By Mr. WARNKE:

Q. Mr. Nicely, you have been shown GX Exhibit 501, GX Exhibit 500 and GX Exhibit 502?

A. Yes, sir.

Q. And I believe you testified that is the order [13,115] in which they were prepared; in other words, 501 was first, 500 was second and 502 was third; is that correct?

A. 501 was first; 500 was second; and 502 was third; that is right, sir.

Q. Now, GX 501 I gather is the plan of action that was dictated by Mr. Manske; is that correct?

A. Yes, it is.

Q. And how do you know that?

A. Well, I was in his office when he dictated it and I was handed a copy of this by Miss Ruth Anderson after she finished writing it.

Q. GX 500 you testified was prepared by you?

A. Yes, it was.

Q. All right. Now GX 500 I notice has handwriting on it which you have identified as being that of Mr. Atwell?

A. Yes, sir.

Q. The typed part of GX 500 indicates that there are nine paragraphs, whereas there are eight paragraphs on Mr. Manske's original?

A. Yes.

Q. How did that come about?

A. If you look at the paragraph which is split, you will find it is quite a long paragraph.

Q. That is paragraph 7 of Mr. Manske's GX 501?

[13,116] A. That is right.

Q. And what did you do with that paragraph?

A. I simply split it. I thought it was easier to read and less likely to miss something in it, so I split it.

Q. Then I notice that on GX 500 your paragraph 9, which is the one that you added when you split out paragraph 7——

A. Yes.
Q.—has been crossed out?
A. Yes, sir.
Q. Do you know how that came about?
A. Well, I think it was moved back up to—it was either moved back up to eight, or, as Mr. Atwell said, it was redundant and wasn't necessary.
Q. So it was Mr. Atwell who struck out paragraph 9 and moved the substance of paragraph 9 into 8 and 7?
A. Yes, that is Mr. Atwell's writing.
Q. Does that return the substance of paragraph 7 and paragraph 8 to the way it was in GX 501, the Manske original?
A. I think substantially the same, yes.
Q. Yes.
But is the language identical with that which exists in paragraph 7 and paragraph 8?
[13,117] A. No, there is a—I think he dropped the word "a." or letter "a" out.
Q. All right.
Then turning to 502. You testified that that was also prepared by you; is that correct?
A. Yes, it was.
Q. And from what was that prepared?
A. That was prepared from 500.
Q. And did that contain the exact language in 500 as revised by Mr. Atwell?
A. I think it contains 100 per cent the language plus every other change that was made in 500 and 501.
[13,118] By Mr. WARNKE:
Q. Directing your attention to paragraph 6 of the Manske original, GX 501——
A. Yes, sir.
Q.——this is the one that was prepared on November 17, is that correct?
A. Yes, sir.
Q. And paragraph 6 reads, "Division managers to contact all division managers to discuss contents of teletype and the need for soliciting additional business at present prices."
Did you correct that in any way in preparation of GX 500?
A. Yes, I did.

Q. How does that read?
A. Division managers to contact all district managers.
Q. Is that correction carried over into GX 502, which is based on GX 500?
A. Yes, it is.
Q. Then I notice that in GX 501, the Manske original, in paragraph 8 it says, "Our new policy will become effective midnight, December 18."
It has been crossed out and 14th put in.
A. Yes, sir.
Q. Do you know who put in that 14 and crossed out [13,119] the 18?
A. I don't know who put in the 14 on there.
Q. When you prepared GX 500, was that prepared at a time when GX 501, the Manske original, contained the original date of December 18?
A. Yes.
Q. When was that date of December 18 changed to December 14?
A. On the—on or after the 19th of November.
Q. And, in fact, your new policies were made effective on midnight, December 14?
A. Yes, sir.
Q. When did you prepare GX 500 from GX 501?
A. Well, I think 500 was prepared on the—it would have been prepared on the 18th.
Q. That is the following day?
A. That is the following day.
Q. And GX 502, you say would have been prepared on the 19th or thereafter?
A. Or thereafter, yes.
Mr. WARNKE. I have no further questions, Your Honor.
Mr. FRICANO. Nothing further, Your Honor.
• • • • •
[13,120] • • •
COLON BROWN, called as a witness, and having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By Mr. WARNKE:

Q. Mr. Brown, would you state your address, sir?

A. 325 Delaware Avenue, Buffalo, New York.

Q. And you are the Chairman of the Board of National Gypsum Company, a Defendant in this case?

A. Yes, sir.

• • • • •

[13,132] By Mr. WARNKE:

Q. And what job did you assume at that point?

A. I think I spoke a little quickly. I wasn't removed from it. I was given a new title.

Q. What was that?

A. Yes, this is correct.

I moved from the Corporate Development Vice-President to Vice-Chairman of the Board of National Gypsum Company.

Q. And you remained as Vice-Chairman of the Board for what period of time?

A. Approximately six months.

Q. Following that——

The COURT. One of your subordinates was asked that question, was asked something along this line, so I will ask you: Is that about the time you got access to the company plane?

The WITNESS. I had authority, Your Honor, and privileges in controlling that company plane as of my next position, which took place on January 1st, 1965.

The COURT. All right.

By Mr. WARNKE:

Q. And it was then that you became Chairman of the Board?

A. That's right.

[13,133] By Mr. WARNKE:

Q. Prior to that, prior to January 1, 1965, in your years with United States Gypsum, and in your years with National Gypsum Company, had you ever had anything to do with the sale of wallboard? Of gypsum wallboard, that is.

A. None whatsoever.

Q. Then beginning on January 1, 1965, I take it that you assumed responsibility for all of the products of the company?

A. Well, I think that Chief Executive Officer describes what the responsibilities are. That's where the buck stopped, and that means everything.

Q. And the company, from your description, has a number of products in addition to gypsum wallboard; is that correct?

A. Hundreds. Broken down in all of its parts, thousands.

Q. So that your responsibilities then, with respect to gypsum wallboard began on January 1, 1965, and were just a part of your overall responsibilities?

A. That is correct, sir.

Q. All right.

Mr. Brown, turning to the period of 1965, after you became Chairman of the Board, there is in evidence a calendar of yours which indicates, Mr. Brown—As a matter of fact, a series of calendars that indicate that during [13,134] 1965 on some occasions you met with Mr. Graham Morgan, who was Chairman of the Board of the United States Gypsum Company.

Do you recall those meetings?

A. I certainly do.

Mr. WARNKE. Mr. Grainer, could the witness have Defendant Brown Exhibits 1 through 17, 18A and B, B, 19, 20, 57, and also Government Exhibit 543.

By Mr. WARNKE:

Q. While Mr. Grainer is getting those, let me ask you, Mr. Brown, if you can remember the subject matter or subject matters that were involved in your meetings with Mr. Graham Morgan in 1965?

A. Yes, sir. I can hardly forget.

Q. Would you describe for us what the discussions were about?

A. Well, almost immediately after I occupied the office of Chief Executive Officer with the title of Chairman of the Board, I was put on notice that we had immediately before us some pressure points, meaning pressure for time, with regard to several patent litigations, lawsuits, where U.S. Gypsum Company were the plaintiffs against National Gypsum Company.

Q. And were these alleged patent infringement suits, or just what was the nature of these suits?

[13,135] A. Yes, sir.

They were claims that we had used certain arts, methods, products, et cetera—I don't remember the details now—that

was in violation of then existing patents allegedly owned by U.S. Gypsum Company.

Q. And do you remember—Let's see.

According to your calendar which is Government Exhibit 536, there is an entry for the date of January 18. And this is your calendar.

It says,

Chicago. Mr. Manske. Company plane. P.M. U.S.G.

As a matter of fact, it says "P. M. Detroit, U.S.G."

A. Yes, sir. I recall it.

Q. Now, was that an occasion on which you met Mr. Graham Morgan?

A. January 18, 1965.

Q. Yes.

A. Yes, sir.

Q. And who else was with you when you met with Mr. Morgan?

A. Mr. F. A. Manske, who was the then—title-wise—Corporate President. And, Mr. D. D. Crandell, who was then the Corporate Vice-President of Research and Development.

[13,136] Q. And did Mr. Crandell have responsibilities in the production and sale of wallboard?

A. No, sir. His responsibility started and stopped with the management and direction of our research and development operations there in Tonawanda, New York.

Q. And in that connection did he have responsibilities as far as the patent position of the company is concerned?

A. Yes, sir. As a part of our R & D organizational structure, Mr. Hause, who was our inside counsel, patent counsel, reported directly to Mr. Crandell as Vice-President of R & D.

Q. And do you have before you the exhibits that I have referred to? Do you have the one that is marked Defendant Brown Exhibit No. 1?

A. Yes, I have it.

Q. And would you look at that and also No. 2? Would you identify those? Don't give us the contents, Mr. Brown, but just tell us what those are?

A. This is a letter dated January 6, 1964, directed to a Mr. Robert F. Hause, and signed by a Mr. Samuel B. Smith, with a copy to a Mr. Dean D. Crandell.

Q. And who is Mr. Hause?

A. Mr. Hause is the patent counsel for National Gypsum Company, in-house counsel.

Q. And you have identified Mr. Crandell as being the [13,137] Vice-President for Research and Development?

A. Right, sir.

Q. And Defendant Brown Exhibit 2, could you describe that for us?

A. This is a letter, file memo—I am sorry—dated January 8, 1965. Subject is U. S. G. Spark Tape Suit. And is was prepared and signed by Mr. D. B. Littlewood.

Mr. WARNKE. I offer Exhibits Brown No. 1 and No. 2.

Mr. FRIANCO. No objection.

The COURT. Admitted.

[Defendant Brown Exhibits 1 and 2 were received in evidence.]

By Mr. WARNKE:

Q. Turning first to the letter from Mr. Smith dated January 6, 1964.

Would you tell us who Mr. Samuel B. Smith was—or is?

A. Mr. Smith was our outside—represented our outside legal patent counsel and was a member of the firm—as is indicated by this letterhead—Merriam, Smith and Marshall of Chicago, Illinois.

Q. Now, I direct your attention, Mr. Brown, to the [13,138] fact that the date on the first page is January 6, 1964, but the date of the second page is January 6, 1965.

Also, the first sentence refers to a decision of Judge Parsons and a judgment entered on December 31, 1964.

Accordingly, I take it that the correct date of this document is January 6, 1965; is that correct?

Mr. FRICANO. If Your Honor please, I don't know how this witness can know that from a document which he didn't author and, for all intents and purposes, didn't receive.

Mr. WARNKE. Your Honor, I believe that anybody could, by looking at the document itself at page 2, and also the date of the decision, come to the conclusion that the secretary hadn't quite adjusted here chronological calendar.

Mr. FRICANO. I withdraw the objection.

The COURT. I would think that's a logical decision.

By Mr. WARNKE:

Q. Also in the lower left-hand corner it says:

January 7, 1965.

Left-hand corner of the first page.

A. That is correct.

Q. "Received, January 7, 1965."

A. Right, sir.

[13,139] Q. Now this letter, I take it, refers to one of these patent suits involving the National Gypsum Company and United States Gypsum Company?

A. Well, it involves one or more. Several.

Q. This one refers to something known as the Gill patent?

A. That's the spark tape case.

[13,140] By Mr. WARNKE:

Q. And on page 2, the letter from Mr. Smith states:

> The time limit to appeal is January 22, Under the circumstances, may we have your comments no later than January 15.

And further on it says that:

> If an opportunity to settle this action and the other actions pending comes into being prior to the last time to appeal, it might be undesirable to appeal.

Now, turning to Defendant Brown Exhibit No. 2, which you have already said is a memorandum from Mr. Littlewood, to the file, with copies to you, and also to Mr. Manske, Mr. Wagner and Mr. Crandell.

Who is Mr. Littlewood?

A. Mr. D. B. Littlewood at that time was the secretary of the corporation, National Gypsum Company.

Q. Now, the document states that:

> At meeting with Messrs. B. D. Crandell, F. A. Manske and C. Brown, reviewed a letter from Attorney Smith of January 6 recommending that National decide to appeal the decision in the subject case. In order to preserve our rights to continue the action we must file the appeal by January 22 and advise counsel of desire to do so by January 15, 1965.

[13,141] Then turning to page 2, at the end of the paragraph that carries over, it says:

> I understand this morning that USG Attorney Spray called Attorney Merriam advising that USG management is willing to sit down with our management to discuss this situation and that Mr. Manske intends to telephone Mr. Morgan to arrange plans for such a meeting.
>
> In view of these developments which cause settlement to appear as a definite possibility, I believe that Fred Wagner will wish to consider establishing a reserve for the deferred attorney fees and he may wish to do so effective in 1964.

Now, do you know, Mr. Brown, whether Mr. Manske, who was the president of the company, in fact did telephone Mr. Morgan to arrange plans for a meeting?

A. I don't know that he telephoned him or what method of communication he used, but an appointment was made to meet with officials of U.S. Gypsum Company in Chicago at their offices on January 18, 1965.

Q. And at that time what was Mr. Graham Morgan's position with U.S. Gypsum Company?

A. It was my understanding, although not told, that he was the president, and possibly the chief operating officer with, of course, Mr. Shaver being the chairman of [13,142] the board and chief executive officer.

Q. Now, you have testified that you and Mr. Crandell and Mr. Manske met with Mr. Morgan.

Who else was with Mr. Morgan at that meeting on January the 18th, 1965?

A. My best recollection, my definite recollection includes Mr. Shaver and Mr. Morgan. I am not sure but there might have been a third person representing U.S. Gypsum Company.

Q. All right.

Do you have before you Defendant Brown Exhibit No. 3?

A. Yes, sir, I have it.

Q. And would you tell us what that is?

A. It is, again, a file memorandum, and it is dated January 19, 1965. It is signed by Mr. Samuel B. Smith, and it indicates copies to Mr. D. D. Crandell and Mr. Charles J. Merriam. I believe it is.

Q. And the Mr. Samuel Smith is the same Mr. Smith that wrote the letter which is Defendant Brown Exhibit No. 1; is that correct?

A. Well, the typewritten signatures appear to be—they are the same, and the actual signature, one is Sam, and the other

one is Samuel D. Smith, and the "S-A-M" in the Samuel looks likes the same "S-A-M" on the other one.

[13,143] Q. Mr. Samuel Smith and Mr. Sam Smith are the same person?

A. I would presume.

Mr. WARNKE. I offer Brown Exhibit 3.

Mr. FRICANO. No objection.

The COURT. Admitted.

[Defendant Colon Brown Exhibit No. 3 was received in evidence.]

By Mr. WARNKE:

Q. Now, this memorandum from Mr. Samuel Smith states that:

> At a meeting held here yesterday with executives of National Gypsum Company, including Mr. Colon Brown, Chairman of the Board of Directors; Mr. Fred Manske, President, and Mr. Dean D. Crandell, Vice President, the Spark Tape suit——

That is the same as the Gill Patent suit; is that correct?

A. That is correct.

Q. "——the Von Hozmburg suit, and the Camp suit were discussed."

Were these also litigations, patent litigations, [13,144] involving you and the U.S. Gypsum Company?

A. That is correct, sir.

Q. And Mr. Smith goes on to list certain monetary results that might exist from certain choices that might be made.

With respect to this memorandum which reflects a meeting which was held by Mr. Smith with you and certain of your colleagues and it took place, according to the memo, on January 18, that is the same day that you testified that you met with Mr. Morgan and Mr. Shaver and possibly some others; is that correct?

A. That is correct, sir.

Q. Did you meet with Mr. Smith, your patent attorney, before meeting with Mr. Morgan and his colleagues?

A. It is my best recollection that we arrived in Chicago early enough to visit the offices of the patent counsel firm of Merriam, Smith and Marshall, at which time, while I have no specific recollection, I feel certain that it was Mr. Smith representing Merriam, Smith and Marshall on our behalf.

Q. On page 2 of Brown Exhibit No. 3, it states that:

> With this background the representatives of National Gypsum then met with executives of United States Gypsum for discussion.

[13,145] Does that reflect the fact that you counseled with your patent attorney before you went over to meet with Mr. Morgan?

A. Oh, yes, sir.

* * * * *

[13,204] * * *

By Mr. WARNKE:

Q. Mr. Brown, Defendant Brown Exhibit 31 is two court proceedings, one on October 22, 1965. And then, the second one in order—although not in chronology—is a transcript of proceedings on September 17, 1965, which is the approximate period that we are now discussing.

And, this is a transcript of proceedings held before Judge Robson in connection with the case of United States Gypsum Company versus National Gypsum Company, September 17, 1965.

It reads in part on page 3 by Mr. Seibold, who is shown to be counsel for United States Gypsum Company.

It says:

> Now, just Wednesday——

This being Friday the 17th, Wednesday would have been the 15th, when you met with Mr. Morgan; is that correct?

A. I am sorry, I am not with you.

Q. I am sorry, Mr. Brown, it is a little confusing. [13,205] because the second transcript is the one which we are now discussing.

A. On page 4 did you say?

Q. Page 3.

A. Page 3.

Q. If you turn four pages from the back.

A. Where it says:

> Well, prior——

Q. No. Four pages from the end.

A. And what is the beginning of the reading?

Q. Halfway down the page it begins:

Now, just Wednesday——

A. Yes, sir, I have it.

Q. "Now, just Wednesday the principals of both parties met in Buffalo and discussed the possibility of settlement.

The COURT. That is welcome news.

Mr. SEIBOLD. Well, prior to that time there had been some feelers or slight discussions, but not enough to discontinue discovery, which was continued. But on Wednesday, it was a serious meeting and an offer was made by one of the parties, and is being considered by the other parties, and under those circumstances—and this, incidentally, has to do with both of the cases—so, under [13,206] those circumstances, we would like to have a moratorium for 60 days to let the principals attempt to work out a settlement.

Mr. Williams then on page 4, who is also listed as counsel for United States Gypsum Company states about halfway down:

This serious settlement discussion just came up very recently, and we have been asked by our principal to request a moratorium so we won't go into further expense while this matter is being discussed at the top level between the principals.

Mr. SHAPIRO. Your Honor, I have been advised of the same information as told to the Court by both counsel of U.S. Gypsum that serious negotiations are underway. We, too, would like a 60-day moratorium.

I would like to add one point to what Mr. Seibold mentioned: The present negotiations are on the highest executive levels in both companies.

The COURT. Well, let me make this suggestion: I will put it on for a status report approximately 30 days from now. If negotiations are progressing satisfactorily, at that time I will grant another 30 days. If the negotiations have broken down and it does not look as though it [13,207] is going to be consummated, then I will ask you to proceed.

I will put it on for October 22nd for further status report.

• • • • •

[13,222] By Mr. WARNKE:

Q. Possibly November 17, November 18, 1965; is that correct?

A. It would likely be in one of those two dates.

Q. Then finally, Defendant Brown Exhibit 46, is the contract of settlement mentioned in the previous letter, and indicating it was entered into this 19th day of November, 1965, disposing of the Van Hazmburg and Camp patent controversies; is that correct?

A. That is correct, sir.

Q. Now, Mr. Brown, we have gone through a number of documents which indicate that throughout 1965, beginning on January 18, you had intermittent contacts with Mr. Graham Morgan and others at U. S. Gypsum Company, but principally Mr. Morgan, both in meetings and in telephone conversations.

Now, in any of those meetings, and in any of those telephone conversations, did you ever discuss in any way what the plans of either company might be with respect to prices of gypsum wallboard?

A. No, sir. Our discussions were as has been indicated by all of this documentation that you have been reading.

Q. Now, the record in this case shows that on November 17, 1965, about contemporaneous with the final [13,223] settlement of the Camp and Von Hazmburg patent suits, that there was an announcement of a price change which was issued by United States Gypsum to be effective on December 15, 1965.

In any of your meetings or in any of your telephone conversations, one of which may have taken place on November 17, did Mr. Morgan ever indicate to you any of the plans of U.S. Gypsum with respect to its prices on gypsum wallboard?

A. My first knowledge of that subject came subsequent to the announcement that U.S. Gypsum Company published, that they were taking some price action. There was never any discussion remotely related to such a subject prior to that with Mr. Morgan.

Q. And did he ever hint to you with regard to any sort of a price announcement that U.S. Gypsum might be making?

A. No, sir, I had no indication.

Q. Did you ever discuss with him what your plans might be with respect to the prices on gypsum wallboard?

A. No, sir.

Q. Now, Mr. Brown, subsequent to 1965, did you ever have any meetings or telephone conversations with Mr. Morgan or with anybody else from U.S. Gypsum with respect to this remaining patent controversy, the so-called [13,224] Spark Tape case?

A. Yes, sir.

Q. And I call to your attention—it is not necessary for you to look at it, it is in evidence—to your 1968 calendar for the date of February 3, 1968, Government Exhibit 1665. It indicates: "Mr. Morgan, Spark Tape."

Now, does that recall to you that you met with Mr. Morgan on February 3, 1968, with regard to the Spark Tape case?

A. I have no specific recollection that it was February.

Is there anything that I can look at to help refresh my thinking?

Q. Just the calendar entry, Mr. Brown, which is already in evidence.

But do you recall a meeting at some time around that date with regard to the Spark Tape suit?

A. Would the calendar indicate where the meeting was?

Q. No, it doesn't indicate where the meeting was.

Now, subsequent to 1965, you have indicated you did meet with Mr. Morgan with respect to the Spark Tape case. And the calendar entry shows a meeting on February 3, 1968.

Would there have been a meeting in between that [13,225] date and late 1967 at some time?

A. You will have to help me with the time. Let me refer to the times that I talked to Mr. Morgan about the Tape case.

Q. Please do.

A. I believe it was the first occasion subsequent to 1965 when, apparently, because of some development in the proceedings, legal proceedings, that is, that there was a basis for Mr. Morgan to take an interest in settling this case, notwithstanding the fact that it had been proposed many, many times beginning as far back as January of 1965 that we include the Spark Tape case in our consideration for settlement; therefore, settling all three cases.

As I recall the entire history of this, it seemed that at some point in time National was in an advantageous position based upon the proceedings in the courts, and at other times it was U. S. Gypsum in the advantageous position. And in simple

language, it had seemed that those who were on the low-end of the totem pole at any given time were interested in settling for that same reason, and the other one wasn't.

And I recall Mr. Morgan asking me for the opportunity to discuss the Spark Tape case. I believe that the first meeting I had was as a result of his coming to [13,226] Buffalo, and at his request setting up the appointment that I meet him at the airport in order to accommodate a quick trip and quick return on his part.

Q. And what occurred at that airport meeting?

A. Well, he did in fact propose that now we settle it. And there was some—there was a fairly clear indication that what he had in mind was our paying U.S. Gypsum Company more money, but based upon what the payments would have been had we had a license during the period that there was an alleged infringement, which was exactly the basis much earlier that we had suggested that we were willing to consider.

I was, unfortunately, although I would have liked to have settled the case, in a position that I had to advise Mr. Morgan that it would not be appropriate for us to seriously consider it, that it had gone as far as it had gone, but, more importantly, that I had the potential obligation, monetary obligation to our patent counsel in Chicago which related to the contingency arrangement that I believe was alluded to earlier in this agreement with the patent counsel.

And, simply stated it was: "We pay you so much for the services rendered, but dependent upon the outcome we will or will not pay you an additional amount." And one of the conditions to that agreement, as I understood it, [13,227] was if we settled, took it upon ourselves to settle at any given time, that the contingency amount became due, and I so explained this to Mr. Morgan as my basis for not being willing at that time to entertain settlement.

Q. And the calendar entry for February 3, 1968, indicates that February 3 was a Saturday. Is it your recollection you met at the airport on a Saturday?

A. Yes, this was on a weekend.

Q. It was on a weekend?

A. Yes.

Mr. WARNKE. Mr. Grainer, might the witness have Defendant Brown Exhibits 47, 58, 48 and 49 through 56, as well as USG Exhibit 675.

By Mr. WARNKE:

Q. While we are getting those, Mr. Brown, let me mention the Government Exhibit 1667 which is in evidence, is your calendar for 1971. It contains an entry for August 16, 1971, which indicates that at nine o'clock you took off for Chicago for a meeting with Graham Morgan.

Do you remember meeting with Graham Morgan and possibly with others on August 16, 1971, or about that date?

A. Well, here again, I cannot recall the date. I am reasonably certain that it was at about that time that I did have further discussions in Chicago with Mr. Morgan [13,228] about the Spark Tape case.

• • • • •

[13,241] • • •

A. Mr. Morgan's.

Q. It shows him to have been in Canada.

A. I—excuse me.

Q. Do you remember talking to Mr. Morgan in Buffalo at a time when he was returning from Canada?

A. Yes. Yes, I do.

Q. And would that have been about August 16, 1966?

A. I think so; yes, sir.

Q. And do you remember what the subject of the conversation with Mr. Morgan would have been at that time?

A. I recall that the occasion for our discussion was the result of a telephone call, I believe, from Mr. Morgan, stating that he was in Canada and was about to depart, on his way back to Chicago, and that he would like to come back—come by on his way, if I had a few minutes. My best recollection tells me that he was very interested in two [13,242] matters related—at least one, but I believe two matters related to the same kind of a subject; namely, tax matters.

As I understand it, there was some litigation between the United States Government and the United States Gypsum Company—I think maybe I mentioned this earlier—in which he was soliciting some assistance from us in the form of records of operations relating to our moving gypsum rock raw material out of Canada into the United States.

We had had further urges, as I recall it, through others in my organization.

Also, there was a subject of interest on tax that I am not too clear on, but it was a report that there was some contemplation, possibly on the part of some government body in Canada, in revising some tax laws—if not revision, to make certain aspects of existing tax laws retroactive.

• • • • •

[13,245] • • •

Q. Was there anybody else other than Mr. Morgan and Mr. Rembert and you?

A. Yes, sir, there was a Mr. Charles Price, who I had the pleasure of riding the cart with while we played golf that day.

Q. Was there any discussion with Mr. Morgan or anybody else with respect to the prices of gypsum wallboard or price changes on gypsum wallboard?

A. No, sir.

Q. Was there any discussion with respect to anything having to do with pricing actions or terms and conditions of sale that might be changed by either company?

A. No, sir.

Q. Now, in addition to meeting Mr. Morgan and others [13,246] in United States Gypsum Company, I take it, Mr. Brown, that over the years you have had occasion to encounter and to talk with representatives of other gypsum wallboard manufacturers, is that correct?

A. Yes, sir, I would characterize it as being relatively infrequent, but yes.

Q. Now you have testified that prior to January of 1965 you had no responsibilities in connection with gypsum wallboard, is that correct?

A. That is correct.

Q. So that any meetings that you might have had, any contacts you might have had, any encounters that might have taken place with other gypsum wallboard manufacturers prior to January 1, 1965, could not have related to gypsum wallboard?

A. If there were any reason at all, it was certainly other than relating to gypsum wallboard.

Q. When you became Chairman of the Board, or prior to the time you became Chairman of the Board, did from time to

time you encounter representatives of competitors in the gypsum wallboard business in the Buffalo office?

A. Oh, yes.

Q. Do you know what occasion they might have had to be present at the Buffalo office of National Gypsum Company?

A. There were a number of reasons, as there are today, [13,247] and presumably will continue to be, for representatives of competitors to be in our office and I presume our people in our competitors' offices, such as the buy-sell arrangements on several different products with various competitors.

On those occasions, when people were, such people are visiting our office—and I say this in the proper attitude—if it is considered by those who are visiting it would be appropriate for me to join them for a social period, it would usually occur, and does still occur at lunchtime and I do recall one or two or three—maybe I could be reminded of more—such occasions with representatives of our competition.

Q. Let me turn to one occasion which is reflected in calendars of yours, Mr. Brown, which are in evidence, and which has been referred to in the course of this trial and that is December 10, 1965.

Your calendar, Government Exhibit 536, indicates 8:45, Mr. Fredericks, Bestwall.

Do you remember on December 10, 1965, or around that time, meeting with Mr. Fredericks of Bestwall?

A. No, sir, I don't remember meeting with Mr. Fredericks at any 8:45, but I think I do recall having lunch with him under the same circumstances that I just described. It might have been that date.

• • • • •

[13.250] • • •

Q. Now, Mr. Brown, there has been evidence in this case with regard to meetings of the Gypsum Association and the evidence indicates that at some point—I believe it was in April of 1966—that you were present at some sort of a presentation that was made in connection with the Gypsum Association meeting.

Do you recall that?

A. Yes, sir, I do.

Q. The calendars in evidence indicate that on April 27 that you were in attendance at such a presentation.

Would you describe your participation in that function?

A. Yes, sir.

I was—I don't characterize this as a Gypsum Association meeting. It was not, in reality, a part of their meetings, whenever they hold them. I had been put [13,251] on notice that someone, or more than one, was interested in what might have been a promotional program to be implemented by the Gypsum Association, and that for reasons that I never did understand—don't understand today—the funds required for this project fell outside the normal source of funds, I guess, such as dues paid by members of the Gypsum Association, special money.

And I was put on notice they were going to make a presentation and make it late in the afternoon, very late in the afternoon.

As a matter of fact, it ran into early evening, I think, and that the whole idea was to sell this program, whatever it was, to each of the companies for what would have amounted to, I guess, a special assessment, but to finance this program, whatever it was.

And thus, I did attend, beginning—my best estimate is something like maybe 5:00 o'clock in the afternoon as the beginning. I sat in. I don't remember the presentation. I have some vague recollection of people who did make the presentation, some vague recollection of some of those who were present.

My best guess is that presentation took as much as an hour. It could have been an hour and a half. I am not sure. I arrived on the scene very shortly before the presentation was made and I departed almost immediately thereafter.

[13.252] By Mr. WARNKE:

Q. And during your presentation there, was there any discussion of industry prices or industry price moves?

A. No, sir.

Q. Did you have any conversation with regard to any matter with any of the people that were present?

A. As a matter of fact, the time before the meeting got underway and my quick departure left no time to discuss anything.

Q. Now, had you ever attended any function sponsored by the Gypsum Association prior to that time?

A. This is—what date was that?

Q. It would be April of 1966.

A. Yes, not prior to that time, subsequent to that time.

Q. What did you attend subsequent to that time?

I will state to you, Mr. Brown, that Government Exhibit 2413 which is in evidence shows your presence at a meeting, semi-annual meeting of the Gypsum Association at Pebble Beach, California, October 12 to 14, 1966.

And I take it you were present there?

A. Yes, sir, I sure was.

Q. Was there any other meeting of the Gypsum Association at any time thereafter at which you were in attendance?

A. No, sir, those were the only two incidents that [13,253] related in any way to Gypsum Association activities.

Q. Now, at that meeting of the Gypsum Association in October of 1966, did you have any discussions with any of the representatives of other companies with respect to your prices or with respect to their prices?

A. None at all.

Q. Did you have any discussion with respect to what either of the companies or any of the companies might do in the future?

A. No, sir.

Q. Turning now, Mr. Brown, to the December 15, 1965, price change as to which there has been considerable testimony in this case.

Do you remember the circumstances under which you made a price change and a price change announcement effective December 15, 1965?

A. "You" meaning my company?

Q. Yes.

A. Yes, I remember that there was a price change at the end of 1965, near the end of 1965.

Q. And what was your role in connection with that price change by the National Gypsum Company? Did you inspire it; were you the one that suggested it, and then, of course, adopted it; or was it proposed to you?

A. Well, it was proposed to me by members of my [13,254] organization, my associates.

Q. And what associates would those have been, if you recall, Mr. Brown?

A. Well, I can't be absolutely certain of each one, but it would have been Mr. F. A. Manske.

Q. He was then the president of the corporation?

A. Yes, sir, he held the title of Corporate President at that time.

And then there would have been possibly Mr. Jay Nicely, and I just don't recall, but any others that Mr. Manske may have chosen from his group of subordinates.

Q. And you accepted their recommendation, I take it, Mr. Brown?

A. Oh, yes.

Q. Now, in that connection had you received any advance word that United States Gypsum or any other Gypsum Company was going to make a price move?

A. I knew about what we were doing for the first time when the recommendation was made to me such as I just described.

Q. Well, I don't believe that answers my question.

Had you received any previous information with respect to something that other gypsum companies might do; had you received any advance word as to the price moves by others?

[13,255] A. My people had told me about an announcement made by U. S. Gypsum Company that was public information but insofar as having any advance information about what anybody was doing, I knew nothing with regard to the price activity of 1965.

Am I answering your question?

Q. That is responsive to my question, Mr. Brown.

Now, in connection with this price change that was made on December 15, 1965, the evidence shows that in addition to some price adjustment, that there was also an announcement of a policy under which the National Gypsum Company would not meet any discounts but would sell at list price; do you remember that?

A. Yes, I sure do.

Q. And do you remember how you happened to adopt that policy on the recommendation of the people that you have described?

A. Yes, sir. It was simply this, that we were announcing published prices to be employed in our invoicing procedures, and that there were to be no exceptions. And those, by the way, were my orders, and it was my method of policing when I made it clear that if any exceptions were to be made they were going to be made with my specific approval.

Q. And that would be your specific approval with [13,256] regard to any meeting of competitive lower prices; is that correct?

A. This is correct. Any exceptions to the published price, and also the change in published price.

Q. Now, the evidence also shows that the announcement which was received from the field by the National Gypsum Company, the announcement of U.S. Gypsum Company, announced the elimination of competitive discounts and an intention to stick by published prices?

A. Yes, sir.

Q. Was your action taken to follow that lead by the U. S. Gypsum Company?

A. I was delighted with the opportunity to do something with prices including eliminating exceptions to list price.

Q. And was that decision to follow the U. S. Gypsum Company lead made by you unilaterally in the exercise of your own business judgment?

A. Well——

Q. I mean, unilaterally—I am using again the word "you" to mean the National Gypsum Company, and not just Colon Brown.

A. Yes, the "you" referring to National Gypsum.

Q. And the "you," Mr. Colon Brown, at the recommendation of your subordinates?

[13,257] A. That is correct.

Q. You decided to follow the policy which was contained in the U. S. Gypsum announcement; is that correct?

A. Correct.

Q. Had there been any agreement with U. S. Gypsum Company or anybody else that you were to follow an announcement of theirs?

A. None.

Q. Now, in that connection you indicated that you gave orders that no competitive discounts were to be met.

Was there any particular policy adopted, effective December 15, 1965, with respect to single plant producers?

A. No, we just simply took the position that were were going to sell at our list price, and, therefore, we were not going to meet anybody if that situation arose, and that would include the single plant or multi-plant, anybody in the gypsum business.

Q. Now, there is also evidence in the record, Mr. Brown, with regard to a change in credit terms that was made by the National Gypsum Company effective on March 1, 1966.

Do you remember a change in credit terms at or about that time?

A. Yes, I remember this subject in a fairly general [13,258] way. My interest was price, but I did know about the subject of terms or conditions or whatever that means. I am today not too sure exactly what it means.

Q. There are documents in the record, Mr. Brown, and I am sure that during your presence here you have heard them referred to, that indicate that beginning in about August of 1965 that there was a study made of credit terms, the credit arrangements that were being offered by the National Gypsum Company; do you recall such a study?

A. Well, I remember over a rather lengthy period of time that there was considerable attention given to this overall subject for several reasons.

Q. What were those reasons?

Mr. WARNKE. And, Mr. Grainer, may the witness have Government Exhibits 908 and 910.

By Mr. WARNKE:

Q. While he is getting those, what were the reasons that motivated the study of credit terms on the part of the National Gypsum Company?

A. Well, it relates to several things. In the first place you will be reminded that my background is one of operations, and if I know anything at all, I know a little bit more about operations than how to promote merchandise products. Therefore, I would be very sensitive to an [13,259] understanding of the economic impact on a manufacturing plant that was faced with a vacilating type of schedule, meaning an unbalanced schedule.

For example, most any straight line operation—and manu-

facturing gypsum board is a straight line operation—that a complete shutdown of the plant and bringing it back on to line is a relatively high-cost activity as opposed to a continuous operation; thus, the theory that I am talking about is that if you were going to run a plant 15 days in a month, it would be disaster to run it every other day. The preferable way would be to run it for 15 days, and then not operate it for 15 days.

And it came to my attention that we were having that kind of an experience in some of our plants as a result of heavy flow of orders into some of our plants at certain times of the month, and that same plant being void of orders at other times during the month, that same month.

And someone recommended to me that the substantial reason for this was the customer's ability to pick a day to his advantage, and his advantage meaning that if he made a purchase on a given day, he would have, let's say, 40 days to pay the bill. If he had bought it the day before, it might not have been more than 10 days to pay the bill, and thus he was picking his day. [13,260] And, as a result of this, I took an interest and requested appropriate people, I believe Mr. Manske, president, and possibly Mr. Wagner, our top financial man, to look at this matter and requested that if there is anything here that can be done that is sound businesswise that I would like to know about it, and I would like to have some recommendations as to what to do.

Q. And at that time, Mr. Brown, did you have any knowledge of studies of credit terms being made by any other gypsum manufacturer?

A. No, sir.

Q. Now, do you have before you Government Exhibit 908?

A. Yes, I do.

Q. Now, this is the memorandum from you to Mr. Wagner dated December 10, 1965, headed: "Sales Terms, Confidential."

And it says:

> We are seriously considering substantial changes in terms on sales made to our trade. It is likely that National would take the lead in introducing such changes in the market.
>
> Will you please presume that the decision has been made to make such changes as are found to be sound and practical and that will produce added profits [13,261] and less capital tie-up in receivables in a complete package ready for execution on short notice after the final decision has been made to introduce such changes.
>
> Please bear in mind that your assumption that the decision has been made is purely an assumption at this time. It will be necessary that you and other appropriate personnel develop definitive new terms followed by development of a specific procedure for administering such a new program.
>
> When this had been completed, I suggest that a meeting be held including all who are concerned with the view of a thorough presentation being the basis for a final decision at that time. We are currently thinking of advising the trade before the first of the year.
>
> Please advise me of your schedule for complying with this request.

Now, I notice, Mr. Brown, there is no specific proposal made by you in this memorandum; is that correct?

A. I am asking for a proposal.

[13,262] By Mr. WARNKE:

Q. And this is consistent with what you have described as being your managerial technique for your subordinates to come up with proposals?

A. Also indication of a further part of the technique, bearing in mind that this subject—more related to what I just testified to—had been ongoing since, as I recall it, about the middle of the year.

And I say, slightly facetiously, this was also a bit of a needle to the gentlemen that, "Let's get going. It is time now to quite studying. It is time to do something."

Q. Well, I have called your attention, Mr. Brown, previously to the fact that your calendar indicates a meeting with Mr. Fredericks on this same date, December 10, 1965.

Was there any connection of any sort between this memorandum and any meeting or discussion you might have had with Mr. Fredericks?

A. It is just as coincidental as one friend bumping into another friend by surprise at an airport.

Q. In other words, you are saying that there was no connection between the two?

A. Absolutely none.

• • • • •

[13,266] • • •

By Mr. WARNKE:

Q. Mr. Brown, you have heard, of course, the testimony with respect to the verification with competitors of reported lower competitive prices or more favorable terms and conditions that from time to time occurred by employees of the National Gypsum Company?

A. Yes, sir.

Q. Is that correct, sir?

A. Yes.

Q. When you became Chairman of the Board in January of 1965, Mr. Brown, did you know about this practice of verification of competitive prices by calling competitors to check on what customers had reported?

A. No, I was not acquainted with such a procedure.

[13,267] Q. Did you ever authorize this procedure?

A. No, sir.

Q. Did you leave it in the form it was at the time that you became Chairman of the Board?

A. Well, by omission, knowing nothing about it.

Q. Now, when did you first learn that National Gypsum Company employees were checking with competitors on customers reports as to the competitor's lower prices?

A. Is the question when did I learn?

Q. Yes.

A. About the procedure of verification?

Q. That's correct.

A. My first real understanding, to the extent that I even have it now, occurred sometime, I believe, in 1968. And I became acquainted with it as a result of the subject being a part of, a total subject regarding certain other litigation.

Q. Now, when you learned of it, what was your understanding as to the purpose of these verification calls to check on customers' reports of competitive prices?

A. Well, my understanding was not in detail. But, broadly stated, it was an exercise or an effort to avoid discrimination in sale prices to like customers.

Q. And was it your understanding that this had been cleared by legal counsel; or, was it something that had been [13,268] conducted without legal counsel's consideration?

A. No. When I became acquainted with the subject of verification, part of my understanding was that it had been guided by legal counsel.

Q. Did you ever ask anybody to verify a competitive price by calling a competitor?

A. No, sir.

Q. Did you ever, yourself, talk with any employee of any competitor, with Mr. Morgan, or with anybody else, with regard to the prices that they were charging as reported by customers that they learned from any source?

A. None.

Q. Do you know whether this practice of verification calls was ever stopped by the National Gypsum Company?

A. Yes. As a result of—Well, I became acquainted with the need for stopping it at a time when it was suggested that we needed to change our stated written policy.

And, as I recall, the occasion for the need for that change related to a court ruling, I believe referred to as the Container Case.

[13,269] By Mr. WARNKE:

Q. And were you advised by legal counsel that the practice should be stopped, pending some sort of review?

A. Yes. As I recall, it was we should discontinue such a practice, but I also believe that it had a qualification to it that some clarification yet was needed, but that the advice was short of that clarification, that under no circumstances, should we continue.

Q. And is it your understanding that the practice was stopped at that time?

A. Yes, sir. It is my understanding it was.

Q. And to the best of your knowledge, did it ever resume?

A. No, sir.

Q. At the time that the verification calls were being made, Mr. Brown, was there any agreement on your part or on the

part of anybody else at National Gypsum Company, to your knowledge, to make these verification calls and to give verification information to competitors?

A. No.

Q. Now, Mr. Brown, you have testified as to your participation in the approval of the change made in prices by the National Gypsum Company on December 15, effective December 15, 1965, and with regard to the change in credit terms on March 1, 1966.

[13,270] Proceeding from that point, March, 1966, how would you describe your role in pricing changes in either list prices or in making competitive reductions?

A. Well, as I think I testified earlier, that my policing agency was simply to instruct all of my people that no changes would be made of any kind with respect to this subject without my participation and, more specifically, my approval.

Q. And did that continue from 1966—1965, 1966, until 1973?

A. Well, in 1968, I believe the first of 1968, we had a minor organizational reorganization, that resulted in one of my associates being appointed to a newly created position with relatively broad authority and responsibility as it related to the Building Products Division and——

Q. And who is——

A. Excuse me.

Q. Excuse me. Who was that associate, Mr. Brown?

A. Mr. John P. Hayes.

Q. That is the Mr. Hayes who testified here; is that correct?

A. That is correct, sir.

Q. And did Mr. Hayes take on particular responsibilities in connection with the pricing of gypsum wallboard?

A. Yes, sir. He took—that was—that function [13,271] was incorporated in his—as an important part of his total function, and, at that point in time, he had the responsibility for making determinations as to when and what he felt, as a good businessman, should be done, and such ideas took the form of recommendations and suggestions, and I participated with him in approving and I did approve anything that he suggested.

Q. And did he take over the authority to determine whether or not and when to meet competitive discounts?

A. Oh, yes.

Q. Now, prior to Mr. Hayes becoming vice president of merchandising, with these responsibilities, did you have any direct participation in any pricing changes in 1967?

A. Yes, sir. As a matter of fact, about the only real definitive participation I had was that occasion that resulted in a nationwide reduction in price, which I believe occurred in May of 1967, which I was very strongly in favor of and was really responsible for it.

Mr. WARNKE. Mr. Grainer, may the witness have Defendant National Gypsum Exhibits 28 and 29 and 388, and also Defendant Brown Exhibit 59?

By Mr. WARNKE:

Q. While he is getting those, Mr. Brown, let me—National Gypsum Exhibit 28 is a memorandum that is admitted in evidence, dated May 15, 1967. Subject, "Reduction in Prices [13,272] of Gypsum Board Machine Products, Effective May 15, 1967."

It reads that—"To our customers," and it states:

> To enable all our Gold Bond customers to be competitive with any individual accounts who may be receiving price discounts or other inducements from our competitors, we are reducing prices on some gypsum board machine products.

And it shows a $2 per square foot reduction on one-half-inch regular and fire shield cream faced wallboard, and it concludes:

> Prices are subject to change without notice. We reserve the right to be competitive.

Then, Defendant National Gypsum Exhibit 29, dated May 13, 1967, is addressed to "National Gypsum Company Dealer Salesmen, Division Managers, District Managers, Sales Managers, Plant Managers, Sales Order Supervisors, C. Gustavus," and it reads:

> Attached hereto is a copy of a price bulletin we mailed to your customers on Saturday, May 13, to become effective May 15, 1967.
>
> The action taken in this announcement was to meet price discounts and other inducements believed to have been made by competition to select accounts on an individual basis.
>
> To provide an equitable competitive [13,273] position for our customers and avoid possible price discrim-

ination, we chose to reduce published in this manner, in preference to meeting specific situations.

Then, you have Defendant Brown Exhibit 59.

Mr. FRICANO. May we have the last paragraph of 388, Your Honor?

Mr. WARNKE. 388?

Mr. FRICANO. Yes. I believe Mr. Warnke read from that.

Mr. WARNKE. No, I have not read from that. I will be delighted to read Defendant National Gypsum Exhibit 388.

Mr. FRICANO. If Your Honor please, I thought he had been reading from 388. I withdraw my request.

The COURT. If you want to read it, you can.

Mr. WARNKE. I am delighted Mr. Fricano called it to my attention. I would like to read it.

Mr. FRICANO. I am glad to be of service.

Mr. WARNKE. Thank you, sir.

It reads:

National Gypsum reduces prices.

It is headed, "For Immediate Release," and there [13,274] is a code number, which is 307–5–67, which I gather means May, 1967.

National Gypsum Reduces Prices.

Buffalo, New York—Effective May 15, the prices of gypsum sheathing and cream-faced gypsum wallboard sold to dealer outlets are reduced by $2 per thousand square feet on one-half-inch basis.

This action was taken to meet price discounts and other inducements believed to have been made by competition to selected accounts on an individual basis.

To provide an equitable competitive position for its customers and to avoid possible illegal price discrimination, this large producer chose to reduce their published prices nationwide in preference to meeting specific situations.

A company spokesman said, "This action is consistent with our policy of fully protecting and maintaining our position in the marketplace." He added, "Continually rising costs are expected to result in rising prices for gypsum products later in the year."

[13,275] By Mr. WARNKE:

Q. I notice, Mr. Brown, that, on Defendant National Gypsum Exhibit 388, it says, at the top "Refer to J. P. Hayes."

Is that the same Mr. Hayes that testified here, and who became vice president in charge of merchandising?

A. That is the gentleman.

Q. And does that indicate that he had some particular responsibilities for pricing, even in 1967?

A. Oh, yes.

Q. Turning, now, again, to Defendant Brown Exhibit 59, without disclosing the contents, would you indicate what that is?

A. Yes, sir. It is a memorandum directed to Mr. A. H. Fay, a Mr. D. G. Hamme, a Mr. L. L. Hank, Mr. J. P. Nicely, and with a copy to Mr. F. A. Wagner, dated May 16, 1967, and it is written by and signed by Colon Brown.

Q. And it is in reference to the May 15, 1967, price change?

A. Yes, sir.

Mr. WARNKE. I offer Defendant Brown Exhibit 59.

Mr. FRICANO. No objection.

The COURT. It is admitted.

[13,276] [Defendant Brown Exhibit No. 59 for identification was received in evidence.]

Mr. WARNKE. The memorandum reads:

You know of the recent drastic action taken regarding price structures on gypsum products. I am told that the economic effect of this action for the balance of 1967 is in the range of 20 cents per common share of stock. This is about an 8 percent profit reduction from our budget for the year.

Needless to say, the effect is very significant and clearly pinpoints our obligation to find areas for substantial reductions in costs that were originally planned when prices were anticipated to hold at higher levels then now exist.

You are requested to make a thorough search of those activities for which you are responsible, with the view of revising your departmental activities for the balance of the year in such a way as to offset the aforementioned profit reductions to the fullest extent possible.

I am further suggesting a special meeting of the Building Products Division when each member of the Board will report on their revised plan, stating specific elements of costs and amounts of reductions [13,277] expected.

> It would appear that we had no choice but to reduce prices. This obviously presents the new problem of how to maintain the highest possible level of profits regardless of the price action. None of us like the problem. I regret the need to make the request of this memorandum. I know that you understand its purpose and agree that we are obligated to meet the situation as a special and very significant problem.

And then, in a special note to Mr. Hayes, who is shown as receiving a copy:

> The special meeting should be arranged for by the chairman appointed for the first month per my special memorandum. C. B.

[13,278] By Mr. WARNKE:

Q. Now according to Defendant National Gypsum Exhibit 388, it was contemplated there would be a price increase later in the year, because of rising costs. Do you recall, Mr. Brown, whether there was a subsequent price increase, an increase in published list prices?

A. Yes, sir.

Again, I don't recall any specific dates or any amounts, but I believe in the latter part of the year there was an announcement.

Q. I believe, Mr. Brown, you testified Mr. Hayes, beginning at least in 1968, made recommendations to you on price. Do I understand you always accepted his recommendations?

A. Well, it wasn't automatic, but that administratively is what happened.

Q. Were there any occasions in which you may have questioned recommendations and subsequently accepted it?

A. I am sure I questioned all of them, Mr. Warnke.

Q. Mr. Brown, you indicated you delegated a good bit of pricing authority to Mr. Hayes. Did that have to do with just gypsum wallboard, or did it have to do with other products?

A. It had to do, that point in time, with all the products manufactured by the Building Products Division.

[13,279] Q. You had other divisions during the same period, as I understand it.

A. Oh, yes, sir, substantial.

Q. And many other products than gypsum wallboard?

A. Oh, yes, sir.

Q. Was it your practice to delegate a good bit of authority with respect to these other products?

A. It was the only way I could function in my office. The scope of the business was such that such delegation was an absolute requirement in order for the business to function.

Q. All right, Mr. Brown.

We have reviewed in our examination a number of meetings with competitors, as reflected by calendars, expense accounts and so forth.

I take it there must have been a number of other meetings you may have had, or encounters you may have had with representatives of competitors in both the gypsum wallboard business and many other businesses in which your company is engaged?

A. Yes. The function of an office such as I hold makes it necessary that you move around considerable and as a result of the moving around, and attending various types of meetings, for any number of reasons it is almost impossible to not encounter some of your competitors, [13,280] especially when we have common interests, such as National Association of Homebuilders and things of that sort. Sometimes governmental requests come into Washington in an attempt to assist in some of the problems that they have that relate to industry, and in our case specifically, construction industry. It is impossible to avoid.

Q. I have asked you with regard to the specific meeting and telephone calls which we have detailed in the course of this questioning. I would like to ask you with respect to any other meeting whatever that there may have been, whenever they may have occurred, did you, in the course of any of these meetings or conversations with any competitors, ever, on any occasion, agree with them with respect to the prices that you would charge?

A. No, sir.

Q. Did you ever on any occasion receive from them information with regard to price moves or changes in terms and conditions of sale that they intended to make?

A. No, sir.

Q. Did you at any time enter into any sort of agreement, expressed, implied, tacit or any other way, in which your freedom of business decisions and business activity was curtailed?

A. No, sir.

Q. Did you enter into any price fixing agreement [13,281] or understanding of any kind?

A. None at all.

Mr. WARNKE. I have no further questions, Your Honor.

The COURT. Does any other defense counsel have any questions?

Is there any cross-examination?

Mr. FRICANO. Yes, Your Honor.

CROSS-EXAMINATION

[13,284] • • •

Q. It is not fair to state, then, that one of your purposes in making this visit was not to get to know Mr. Morgan and get to know a little bit about the gypsum business?

A. Mr. Fricano, I feel reasonably certain that the occasion for meeting Mr. Morgan would have been substantially delayed, or anybody else in this industry, had it not been in this particular case with Mr. Morgan, for these patent suits.

Q. I don't think that is my question.

A. Your question, as I understood it, was what was my motivation for visiting Mr. Morgan.

Q. Part of your motivation.

A. My entire motivation was to deal with these patents, which I found as a brand-new subject, and one I construed to be a very substantial, important subject, and one that I didn't feel very enthusiastic about, which I think is obvious when we think in terms of communications to me indicating there was a potential cost to my company, dependent upon the outcome, that could run into millions of dollars and I simply did what I thought in good business judgment, that I was obligated to do, with the responsibility that I had.

[13,329] • • •

By Mr. FRICANO:

Q. Did you learn whether or not Mr. Atwell was exchanging information with his competitors, with National Gypsum's competitors, on job price protection?

A. I don't think I can testify that I ever learned specifically that Mr. Atwell specifically did any verification on job protection. I think I testified in 1968 I learned that the practice of verification was occurring.

Q. Well, do you understand the practice of vertification to exclude ascertaining job price protection from competitors? [13,330] A. I don't understand it either that it excludes it or includes it. I know that little about verification practice.

Q. Well, sir, would you say that your subordinates—and by your subordinates I mean Mr. Atwell or whomever else was in the organization—was contacting competitors with respect to prices and terms and other matters, that they would have the right to contact competition for the purpose of trying to confirm that which had been recorded or alleged or rumored as part of their overall responsibiltiy of staying as knowledgeable as they can as to what the activities in the marketplace are?

A. Well, I would say that they would be, in following such a practice, within their rights as long as the specific terms of our stated policy were being observed. I am not sure that I would know how to interpret your question into our policy as stated.

Q. I read your answer to a question that was asked on a prior occasion, sir, concerning what your subordinates had the authority to do with respect to price checking. That is where this came from.

A. Yes.

Q. Now, you did so testify, did you not, on a prior occasion?

A. Would you mind reading it again, sir?

[13,331] Q. Certainly, sir. The question was, at page 106:

> Question: They have authority to?
>
> Answer: They have the right to contact competition for the purpose of trying to confirm that which had been recorded or alleged or rumored as part of their overall responsibility of staying as knowledgeable as they can as to what the activities in the marketplace are.

A. Yes.

Q. And this was in January of 1968, sir, when you gave such testimony?

A. Yes, that is when I learned about verification.

[13,332] By Mr. FRICANO:

Q. Now, who else did you learn of besides Mr. Atwell that was contacting competitors in this connection on behalf of United States Gypsum?

The COURT. In what connection now?

Mr. FRICANO. In the connection of ascertaining lower competitive prices or terms and conditions of sale in the marketplace, Your Honor.

Did I misspeak? If I misspoke, I meant National Gypsum.

The WITNESS. Okay.

Would you mind doing me a favor and asking me the question again? I am sorry.

By Mr. FRICANO:

Q. Certainly.

Besides Mr. Atwell, whom else did you learn at National Gypsum was contacting competitors with respect to prices and terms and conditions of sale?

A. I can't identify any specific person. I could generalize and say that anyone directly responsible to Mr. Atwell whom Mr. Atwell may have delegated that authority to, as a group, whether that group contained one person, two persons, or more, but I couldn't identify names having learned about their following a verification practice.

Q. Would it be fair to state that anyone above Mr. [13,333] Atwell, such as Mr. Nicely or Mr. Jack Hayes, or Mr. Duncan, would be one of those individuals?

A. That's possibly . . .

Mr. WARNKE. Objection, Your Honor, unless the question is rephrased to ask whether he is referring to somebody who did verify or who would have the authority to verify because they were Mr. Atwell's superiors.

By Mr. FRICANO:

Q. Mr. Brown, with respect to the gentlemen I just named, Mr. Nicely, Mr. Hayes, and Mr. Duncan, would they have the authority under your policies to contact competitors with respect to terms and prices?

A. At what point in time, please?

Q. Well, between 1965, when you first came with the organization, and 1973.

A. At varying times, yes, I think that that group would have the authority. Not necessarily continuous through that period of time is applicable to either one of them.

Q. Do you know whether or not each one of them, or any of them, actually did contact competitors in this regard?

A. No, sir.

I have no definite knowledge that they did or they [13,334] didn't.

Q. Do you know of your own knowledge, of course, who within the credit department—if anyone—were authorized to contact competitors with respect to extended terms?

A. By name?

Q. Yes, sir.

A. Well, here again, for the entire time period that you earlier specified——

Q. Yes, sir.

A. I believe Mr. Williams, E. E. Williams, who I believe was the head of our credit department, or for that division.

And I believe that his successor was a Mr. Barber. Beyond that I would have no knowledge as to whether or not they in turn felt the justification for further delegation. But I would doubt it.

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[13,341] • • •

Q. And what kind of industry relationships were you referring to, here, sir?

A. Well, very simple, Mr. Fricano, I think. The Finance and Credit Department was representing to me that they had the capability of judging what would and would not work in a marketplace in the sale of a product, and it just seemed to me that their responsibility was to comply with my request of coming up with some alternative suggestions as to what, mechanically, could work, and it would be up to those who had familiarity with the distribution and sale of merchandise, qualified people, to make a decision as to whether or not it would work, not the Credit Department or the Finance Department; and that is the spirit of this letter.

Q. And you——

A. You get me some ideas, and we will make a determination, the proper people will make a determination as to the [13,342] workability of your ideas.

Q. All right sir.

A. And as to the industry relationship with reference to Mr. John Brown—industry doesn't necessarily exclusively relate to manufacturers in the business. It also includes that very important segment called customers, and whether or not terms,

price, or what have you is acceptable in the marketplace, really, rests with the reaction of the people who buy from you, called customers, and that was the entirety of this letter.

Q. Well, is it your testimony, then, sir, that Mr. Brown was to go out to the dealers and get their concurrence in this?

A. Mr. Brown had been, for years, responsible at one level or another in sales activities out in the marketplace, having been originally a salesman, later a district sales manager, I think, moving up in all levels of sales—never had any other experience, and I just suspected that that kind of experience was a very valuable source for an appraisal whether or not something would work that related to the marketplace.

Q. I understand what you are saying, sir; but my question is, is it your testimony that Mr. Brown was to go out into the marketplace to obtain a dealer's concurrence in tightening terms?

[13,343] Mr. WARNKE. Objection, Your Honor. That clearly was not the testimony.

The COURT. Well, I am sure the witness will answer if that was the situation.

The WITNESS. No, sir. There is no inference, in my interpretation, that that was a remote thought. On the contrary, it was—my suggestion related to his background and experience.

He has pretty good market intelligence, not necessarily based upon the condition in this particular case, as of this date. This is not unusual, throughout the whole history, I guess, of most any company manufacturing any product. So his accumulative knowledge, over a period of time, would, in my opinion, together with the top management of the parent company, collectively, come up with a better appraisal as to what would and wouldn't work in a marketplace.

By Mr. FRICANO:

Q. All right, sir. Now, with respect to Mr. Nicely's involvement, did you rely on Mr. Nicely with respect to credit matters?

A. My hesitancy relates to time periods. There have been a lot of changes in our organization from time to time.

Did I rely on Mr. Nicely for credit responsibilities?

Q. Yes, sir.

A. No.

[13,344] Q. Did anyone else in the organization rely on Mr. Nicely in credit matters?

A. I wouldn't know that.

Mr. FRICANO. I was going to say, "to your knowledge." I left it off the end, Your Honor.

By Mr. FRICANO:

Q. Well, why don't you take a look at Government Exhibit 902? Perhaps that will refresh your recollection.

A. All right, sir.

Mr. FRICANO. In the meantime, while Mr. Grainer is getting Government Exhibit 902, I will identify it, Your Honor.

This is a memorandum dated August 11, 1965, and it is from the Senior Vice President of Finance, and it is directed to Mr. Colon Brown, Mr. Manske—president, at that time—and Mr. Nicely, and, as well, two others, Hank and Mears.

And it states:

> On August 5th, you received a copy of a memorandum prepared by John Shea recommending that the industry adopt a new discount policy.

The next paragraph says: "Subject to any comment by Mr. Nicely, I should like to advise you," and so forth, and then, at the bottom of the page——

Mr. WARNKE. May I ask, Your Honor, that the "and so forth" be read?

[13,345] Mr. FRICANO. "I should like to advise you that Mr. Williams' investigation discloses that 'years ago our terms were 2 percent 10 days from date of invoice.' This was gradually changed to 10th prox throughout the industry because——"

Does Mr. Warnke wish me to continue reading?

Mr. WARNKE. No. That is sufficient. I just wanted it indicated whose investigation was referred to.

By Mr. FRICANO:

Q. Then, at the bottom of the page—and this document is, of course, addressed to you—it says, "J. P. Nicely concurs, August 27, 1965."

Does that refresh your recollection, sir, as to whether or not Mr. Nicely had a credit responsibility at this time?

A. No, sir; it doesn't necessarily imply it.

Q. All right, sir.

Moving along, do you recall that, on September 3, 1965, again, the senior vice president, in a memorandum to you, concerning this discount situation, commented upon a meeting that was held in Mr. Manske's office, and, in the course of that meet-

ing—and this memorandum deals with that meeting—it states, in part, and I quote——

Mr. MELLOTT. If Your Honor please, [13,346] may we have the identification of the document?

The WITNESS. May I see it?

Mr. FRICANO. I am sorry, Your Honor. It is Government Exhibit 904.

Mr. KECK. I see no relevancy to any question based upon this, and I object to this technique of rereading documents to the jury.

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[13,350] By Mr. FRICANO:

Q. When did you prepare that memorandum? Was it before or after lunch, sir, do you know?

A. I haven't the slightest idea. I could have dictated it the day before, got around to signing it on the day. I could have dictated it and the secretary transcribed it the following day. I might have dictated it over the telephone two or three days earlier.

The COURT. Was your question whether on some day in 1965 he dictated a memorandum to his secretary before or after lunch?

Mr. FRICANO. If Your Honor please, on direct examination he had a recollection going back to 1965 with great specificity.

The COURT. That is quite a recollection. I can't remember yesterday if I did that before or after lunch.

Go ahead.

By Mr. FRICANO:

Q. It wasn't you that announced first with respect to the new credit terms of March 1, 1966? When I say "you," I mean National Gypsum.

A. I do not know, sir.

Q. You do not recall?

A. No, sir, I don't know.

[13,351] Q. Do you recall what the terms were, sir, that were ultimately put into effect on March 1, 1966?

A. No, sir.

Q. Then, of course, you wouldn't know then how long they remained in effect?

A. No, sir, I don't even know what they are today.

• • • • •

[13,516] Q. Dr. Miller, did you have occasion to review any of the transaction price charts that Dr. Cyert presented here during his testimony?

A. Yes.

Q. And do you recall Dr. Cyert's testifying he defied anyone to see any pattern to the pricing with respect to those transactions?

A. I remember that.

Q. Do you recall his testimony concerning dispersion of prices?

A. Yes.

Q. As shown on his charts.

Now is there any reason that you know why his charts would show any less of a pattern than you have demonstrated with respect to the measles charts relating to transactions prices in Boston and Pittsburgh here this afternoon?

A. His chart relates to the entire year 1969 and there were three different list prices in existence. I believe it was for all those areas that he had charted, which would have the lines on the charts quite close together, given that there were so many 5's off each of the three list prices.

[13,517] Q. Why would that make it harder to discern any pattern in the transaction prices?

A. The lines were quite close together. They related to three different list prices and to four, five, six, seven 5 per cents off of those three list prices. As a result, you might get not five or six lines for each of the thirds of the year, but instead would get 15, 18 or 20 lines for the whole year.

Q. Do you know whether his chart showed prices in common for some or each of the Defendant corporations here?

A. I believe they did.

Q. So on any given line were there more than one company that had transactions at that particular price level?

A. Yes.

Q. Have you had a chance to review the joint exhibit, Defendant Joint Exhibits 3 through 13 and some of those which follow?

A. 3 through 13 are the summary sheets?

Q. Yes, I believe they are.

A. I reviewed some of them.

Q. And do you see any pattern of identity of transaction prices at any particular level between and among the Defendant companies?

A. Yes. Joint Exhibit 9 indicates quantities at [13.518] various prices in Pittsburgh for various times at various prices and the kind of pattern that emerges from these transaction sheets is the same kind of pattern that emerges on the overlay to the measles chart.

Q. Does that mean that more than one company was selling at the same price during the same time period?

A. Yes.

Q. And are they shown on those tabulations?

A. Yes, they are.

Q. Would you tell us with what frequency there was transaction price identity among the Defendant corporations?

Mr. MELLOTT. If the Court please, I object to that question unless it is limited to those documents that Dr. Miller says he looked at. He indicated he did not look at all of them.

The COURT. It is, of course, limited to those documents.

By Mr. THORSON:

Q. Take for example Joint Exhibit 9, does that relate to Pittsburgh?

A. Yes. The first sheet relates to the first third of the year 1969 for half-inch. It lists MSF quantities for each of the companies and United States Gypsum, National, Celotex and Georgia-Pacific direct sales and three of the four companies are shown in this period [13.519] to have sold at list of $48.25; two of them have sold at one 5 off; all four sold at two 5's off; four of them sold at three 5's off and four of them sold at four 5's off. On this particular sheet there are a few other entries indicated by, for example, by the other dots that are off the lines on the overlay.

[13.520] By Mr. THORSON:

Q. And within that range of prices, were there any price categories in which none of them sold?

A. Yes. There were several prices at which there are no entries.

For example, from $39.50 to $41, there were no transactions. That's the interval between three fives off and four fives off.

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[13.685] CROSS-EXAMINATION

By Mr. DELONE:

Q. Whether or not Portland is a discrete market, that Portland SMSA, in studying industry structure—is it of significance to you to note shifts in market share, in an area the size of the Portland SMSA? As you might note, from one part of this chart, one company goes up, another goes down. A company that is small, nationally, is a leader in that area. Is that of significance to you?

[13.686] A. Yes; not only is market share important in any moment of time or any year, but shifts in market shares are important, too.

Q. And in reviewing this document, Defendants' Joint Exhibit 43, did you not find numerous and frequent shifts in market share, one company edging out the other, one company starting with a small share and moving up in relation to those companies we have here? There were only three of them we were able to get.

A. That appears to be the case, and I understand that to be Dr. Cyert's testimony.

Q. Now, you said, as I understood your testimony yesterday, when Mr. Thorson asked you a question about increasing list prices, you said—this is at transcript 13.523, 24—"I think that could be consistent with collusion;" that is, increasing list prices could be consistent with collusion.

Now, increasing list prices could be consistent with other factors such as, for instance, rising costs; could it not?

A. Of course.

Q. And what of decreasing prices could that be consistent with collusion?

A. Under some conditions, it could be, Mr. DeLone.

Q. And under others?

[13.687] A. It could be consistent with decreasing costs, too.

Q. And it could be neutral, if you will, as collusion or non-collusion decreasing prices?

A. Yes.

Q. And increasing prices, either one?

A. Yes.

Q. You characterized the period which you studied, '65, as I understood you to say, to middle '71, or you looked at the particular concern as a period of rising prices, if I understood your testimony correctly. Did you say that?

A. That was from recollection of the list prices.

Q. Oh, you were talking——

A. I would like to check that, say, with Pittsburgh, if you will permit me.

Q. Oh, you are talking list prices, now?

A. I believe that was the question that was asked.

Q. Well, I wasn't entirely sure.

A. I don't have information on transaction prices for that particular period.

Q. Well, did you have information on realized prices?

A. No, I didn't.

Mr. DeLone. May we have, please——

The Witness. I am sorry. Let me correct that, Mr. DeLone. [13,688] On a very aggregate basis, I did not have transactions on an individual basis but the average price for a whole year's period for a whole company, I believe, for half-inch, has been introduced, and that is an average, average price——

Q. It is a——

A. ——which can be interpreted as an index of what happens to transaction prices over time.

• • • • •

[13,693] Q. • • • Now you have said with reference to these measles charts that they show a pattern, and by that—what do you mean by a pattern, Dr. Miller?

A. I see a pattern in the numbers of deviations, number of 5 percents off list. To me, that is a pattern.

Q. You mean they tend to cluster at a 5 or two 5's or three 5's or seven 5's?

A. Yes, they do. That is my interpretation and that is what I am calling the pattern.

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[13,694] Q. Whether you call it a pattern or not, can you not see from National Gypsum 367–A, that there is a wide diversity or dispersion of prices day-by-day, month-by-month, throughout the entire year?

A. Yes, there is a wide dispersion.

Q. And you find some clustering at a figure which has seven 5's off the then list?

A. Yes.

Q. But it will be at many steps in that all in the [13,695] same day, just for National Gypsum?

A. All in the same week, all in the same month. I am not sure all in the same day.

Q. That is by days, you understand that?

Yes, I understand that, but I have not checked it day-by-day to see if there are many transactions at different prices.

Q. Now, the pattern, of course, wouldn't advance this discussion much to show Pittsburgh. It would be substantially the same, would it not?

A. Yes.

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[13,698] Q. And I guess, if we look at 359–A, there, if I understand your testimony, this is list; this is five percent off list; this is two fives off list; this is four fives off list; and that's as far as you went with your fives calculations, which leaves this one, the biggest one of the group, the largest quantity, not in any pattern, even of a certain number of fives off list, and leaves this high quantity—that's the third from the top—also not in any such pattern.

A. If I remember what I said yesterday, the one you point out, 2005 MSF, the longest——

Q. Yes.

A. ——does not fit into the three fives off.

I have a suggestion on that, which I think is three fives plus three percent—the price fits. Now, I don't know for a fact that that kind of pricing existed in Boston in that second third of 1969.

Q. Well, working back from these figures, you could work out a percentage plus another percentage and explain, in that sense, each lines; couldn't you?

[13,699] A. I have seen a certain number of fives plus three percent off on some of the price cut sheets for some of the companies. I have seen that as a method of pricing.

As I say, I don't know whether it was used in Boston at this time or not.

Q. When you say the price cut sheets, you mean the sheets which reflect the customer saying, "I've been offered five or two fives or three fives, and another three percent, by somebody else"?

A. Yes.

Q. Will you match it?

A. Yes, the RTMC's, the 350's, the 360's, that group of documents.

Q. So that, from examining those, it appears that the lingo of the trade and the customers and the buyers is sometimes cast in terms of a certain number of fives off list; is that right?

A. As you put it, the lingo of the buyers and sellers is reflected in these prices.

Q. And in some other trade, it might be a dollar off list, two dollars off list, three dollars off list, in some other industry?

A. I presume, in other industries, there are other ways of talking about deviations off of list price.

Q. But if you have a list price, and you are not— [13,700] and the sales, the transaction, is not going to be affected, there has to be some way to communicate and determine the price, and the price can be calculated by, I say, a number of dollars off list, or a certain percentage off list, ten percent, five percent, it makes no difference, does it, except to the buyer and the seller, in terms of how much they get for the product or pay for the product?

A. It seems to me that's a big difference.

Q. All right; but, in terms of an economist, what is the significance of that pattern that you have described, particularly when it is not even a consistent pattern, as we have indicated here?

A. It is a pattern, and it has significance in the following way: The list price, to the extent that the list price is uniform, as I think it is for a good deal of the time for half-inch wallboard, is the hook on which the transaction price is based, or on which the offer to sell are based, and here is the lingo, so many fives off list, so that, then, the buyer can determine what his actual dollar figure is per MSF.

Q. It is a way, if I understand, you are saying, of calculating the price of the particular transaction.

A. Or offer, yes.

Q. Or offer. And if, in the same time period, some transactions are one five, some at two, and some at three, [13,701] and some at other intervals——

A. Some at seven fives.